No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

INDEX

	PAGE
Docket Entries	1a
Complaint	8a
Petition for Removal	18a
Answer	21a
Stipulation dated December 5, 1977	27a
Memorandum Opinion dated February 17, 1978	32a
Pretrial Order dated April 13, 1978	42a
Stipulation, dated May 9, 1978	49a
Order Certifying Class Action, dated August 9, 1978	52a
Memorandum Opinion, dated August 24, 1978	54a
Opinion, dated December 20, 1978	70a
Order, dated December 20, 1978	80a
Letter Opinion, dated March 28, 1979	81a
Order, dated March 28, 1979	83a
Order, dated April 4, 1979	85a
Amended Order, dated April 5, 1979	86a
Notice of Appeal, dated April 12, 1979	88a
Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980	89a
Judgment, dated February 15, 1980	119a
Certified Judgment in Lieu of Mandate, dated March 27, 1980	121a
Order Granting Writ of Certiorari	122a

JOINT APPENDIX

Docket Entries

Date	*Proceedings*
8/10/77	Petition for removal from Superior Court of Union County with copies of Complaint and order to show cause re preliminary injunction filed 8-9-77.
8/10/77	Removal Bond, filed 8-9-77.
8/10/77	Notice of Allocation and Assignment filed. (Newark-Lacey)
8/15/77	Hearing on plaintiffs' application for a *temporary restraining order.* Ordered hearing continued to September 12, 1977. (Lacey) (8-11-77)
8/15/77	Plaintiffs' notice of motion for a temporary restraining order returnable August 11, 1977, filed 8-11-77. (No brief)
9/ 1/77	Stipulation and order extending time of defendant to answer complaint to 9-13-77, filed 8-31-77. (Lacey) Notice mailed.
9/ 8/77	Affidavit of Virginia Triano, filed 9-7-77.
9/ 8/77	Affidavit of Walter Meissner, filed 9-7-77.
9/14/77	Hearing on plaintiffs' application for a *temporary restraining order.* DECISION RESERVED. (Lacey) (9-12-77)
9/14/77	Hearing on application of State of N.J. for leave to intervene as defendant. Ordered hearing continued to a date to be fixed. (Lacey) (9-12-77)

Docket Entries

Date	*Proceedings*
9/14/77	*Answer,* filed 9-13-77.
10/ 6/77	EVIDENTIARY HEARING on plaintiff's application for a preliminary injunction. DECISION RESERVED. (Lacey) (10-5-77)
10/11/77	Transcript of hearing held August 11, 1977, filed.
10/18/77	Plaintiffs' notice of motion to certify this action as a class action returnable November 14, 1977, proof of service filed. (Brief submitted)
11/16/77	At call for hearing on motion of plaintiffs to certify this action as a class action, Court indicated motion consented to. (Lacey) (11-14-77)
12/ 9/77	Stipulation, setting forth applicability of pensions plan re retired employees, filed 12-7-77.
1 /9/78	Transcript of hearing held 10-5-77 filed 1-6-78.
2/27/78	Memorandum opinion, filed 2-21-78. (Lacey) (denying plaintiffs motion for preliminary injunction)
2/27/78	Order denying plaintiffs motion for preliminary injunction, filed 2-21-78. (Lacey) Notice mailed.
3/ 9/78	Hearing on plaintiff's motion for class action certification. Ordered motion granted. Order to be submitted. (Lacey) (3-6-78)
3/ 9/78	Ordered pre-trial conference set for April 10, 1978 before Judge Hunt. (Lacey) (3-6-78)
3/ 9/78	Ordered trial date set for May 1, 1978. Order to be submitted. (Lacey) (3-6-78)

Docket Entries

Date	*Proceedings*
4/19/78	Status Conference. (Lacey) (4-14-78) Ordered trial date set for 5-15-78.
4/21/78	*Pre-trial* order, filed 4-19-78. (Hunt) (Directing that State of N.J. may intervene as a party defendant and acknowledging Judge Lacey's order to certify this action as class action.)
4/28/78	*Pre-Trial Conference.* (Hunt) (4-13-78)
5/11/78	Stipulation re Exhibits A, B, and C are designated as Joint Exhibits of Pensions Plans; joint Exhibits D and E are true copies of Section 2 of Article IV of the 1958 and 1961 Pension Plans, filed 5-10-78.
5/17/78	EVIDENTIARY HEARING on plaintiffs' application for a permanent injunction. DECISION RESERVED. (Lacey) (5-15-78)
5/25/78	Transcript of hearing held March 6, 1978, filed 5-24-78.
5/25/78	Transcript of hearing held May 15, 1978, filed 5-24-78.
5/30/78	Acknowledgment of service of copy of complaint by the U.S. Department oi Labor, Washington, D.C., filed 5-26-78.
8/10/78	Order certifying Class Action, etc., filed 8-9-78. (Lacey) Notice mailed.
8/25/78	Memorandum Opinion, filed 8-24-78. (Lacey) (Granting plaintiff's application for a permanent injunction, etc.)

Docket Entries

Date	*Proceedings*
9/18/78	Hearing on defendant's application to settle the form of the order. Ordered hearing continued to October 29, 1978. (Lacey) (9-15-78)
9/27/78	Transcript of hearing held September 15, 1978, filed 9-26-78.
10 /2/78	Defendant's notice of motion for reconsideration of Memorandum Opinion of August 24, 1978 returnable October 30, 1978, proof of service filed 9-29-78. (Brief submitted)
11/ 2/78	Transcript of hearing held September 12, 1977, filed.
12/13/78	Hearing on defendant's motion for reconsideration of Memorandum Opinion of August 24, 1978. Ordered motion denied. (Lacey) (12-7-78).
12/21/78	OPINION filed 12-20-78. (Lacey) (the previous decision is followed)
12/21/78	Order directing the previous decision of the court embodied in opinion of August 24, 1978 is adhered to, filed 12-20-78. (Lacey) Notice mailed.
1/10/79	Plaintiffs' notice of motion for plaintiff's counsel fees and costs of action be charged against defendant returnable Feb. 13, 1979 proof of service, filed 1-9-79. (Memorandum submitted)
1/12/79	Substitution of attorney on behalf of plaintiff, filed 1-11-79.
1/26/79	Defendant's notice of motion to stay judgment pending appeal returnable Feb. 13, 1979, proof of service, filed 1-24-79. (Brief submitted)

Docket Entries

Date	*Proceedings*
1/29/79	Affidavit of Lester Weiner in support of plaintiffs' motion for counsel fees and costs, etc., filed.
1/29/79	Affidavit of Lester Weiner of services and disbursements, filed.
1/29/79	Affidavit of Marc C. Gettis for services rendered, filed.
1/29/79	Affidavit of Joel B. Hopmayer for services rendered, filed.
1/31/79	Transcript of hearing held December 7, 1978, filed 1-30-79.
2/ 8/79	Affidavit of Richard Meyer filed. 2-6-79
2/ 8/79	Affidavit of Ray J. Wright filed. 2-6-79
2/ 8/79	Certificate of Service of affidavits filed. 2-6-79
2/20/79	Hearing on motion of plaintiffs' for counsel fees and costs of action DECISION RESERVED. (Lacey) (2-13-79)
2/20/79	Hearing on motion of defendant to stay judgment pending appeal. DECISION RESERVED (Lacey) (2-13-79)
2/20/79	Continued hearing on defendant's application to settle the form of the order. DECISION RESERVED. (Lacey) (2-13-79)
3/21/79	Transcript of hearing held February 13, 1979 filed, 3-20-79.
3/30/79	Letter Opinion filed 3-29-79. (Lacey) (Denying Plaintiffs' motion for attorneys' fees and granting defendant's motion for stay

Docket Entries

Date	*Proceedings*
3/30/79	Order for permanent injunction in favor of Plaintiffs, Henry Buczynski, Alex Borusovic and other retirees similarly situated and against Defendant, The General Motors Corporation with costs, and staying order during pendency of appeal, filed 3-29-79. (Lacey) Notice mailed.
4/10/79	Order withdrawing order for permanent injunction filed 3-29-79 filed 4-5-79. (Lacey) Notice Mailed.
4/10/79	Order for permanent injunction in favor of plaintiffs, Henry Buczynski, Alex Borusovic and other retirees similarly situated and against defendant, The General Motors Corporation with costs, and staying order during pendency of appeal, filed 4-5-79. (Lacey) Notice Mailed.
4/20/79	Notice of appeal of defendant filed 4-12-79 at 3:40 P.M.
4/20/79	Copies of notice of appeal sent to U.S.C.A. and Weiner, Staubach, Edelson & Hopmayer, Esqs.
5/10/79	Notice of motion of plaintiffs to tax costs ret. 5-10-79 and Bill of costs and disbursements, filed 5-9-79.
8/ 1/79	Briefs of defendant-appellant and *amicus* filed with the Court of Appeals
9/14/79	Briefs of plaintiffs-appellees and *amicus* filed with the Court of Appeals
10/31/79	Reply Briefs of defendant-appellant and *amicus* filed with the Court of Appeals

Docket Entries

Date	*Proceedings*
1 /8/80	Argument of the case in the Court of Appeals
2/15/80	Judgment of the Court of Appeals for the Third Circuit entered; Opinion of the Court announced
3/ 3/80	Petition of plaintiffs-appellees for rehearing *en banc* filed with the Court of Appeals
3/19/80	Petition for rehearing denied
3/27/80	Judgment of the Court of Appeals certified in lieu of mandate
5/30/80	Application by plaintiffs-petitioners for an extension of time in which to file a Petition for a Writ of Certiorari filed
6/ 2/80	Application granted by Order of Justice Brennan
8/ 8/80	Petition for a Writ of Certiorari filed
8/18/80	Application by defendant-respondent for an extension of time in which to file a Brief in Opposition filed
8/20/80	Application granted
10/ 2/80	Brief in Opposition filed
11/ 3/80	Writ of Certiorari granted

Complaint

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: UNION COUNTY
CIVIL ACTION No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC and
OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

vs.

THE GENERAL MOTORS CORPORATION,

Defendant.

Plaintiffs, Henry Buczynski who resides at 144 Willow Avenue, in the Borough of Garwood, County of Union, State of New Jersey, and Alex Borusovic who resides at 96 Longfellow Street, in the Borough of Carteret, County of Middlesex, State of New Jersey for themselves and for all other retired members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, similarly situated say:

1. Plaintiffs were hourly employees of the General Motors Corporation with places of business located at 1300 Raritan Road, Clark, New Jersey; 1016 West Edgar Road, Linden, New Jersey and Parkway Avenue, Trenton, New Jersey.

2. Plaintiffs were hired by the defendant, General Motors Corporation as hourly rated production employees.

3. Plaintiffs became members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America.

4. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America is recognized by the defendant, General Motors Corporation, as the sole bargaining agent for all hourly rated production and maintenance employees of the New Departure Hyatt Bearings Plant at Clark, New Jersey, the Linden Assembly Plant in Linden, New Jersey, and the Fischer Body Plant in Trenton, New Jersey.

5. Plaintiff, Alex Borusovic worked continuously for the defendant, General Motors Corporation for a period of 22 years until March 31, 1973, at which time he retired.

Plaintiff, Henry Buczynski worked continuously for the defendant, General Motors Corporation for a period of 34 years until January 1, 1972.

All other unnamed plaintiffs on whose behalf this action is brought worked for the defendant, General Motors Corporation for a number of years and retired prior to the date of July 14, 1977.

6. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America have had successive written Agreements covering the pension plan for hourly rated production and maintenance employees of the International Union, United Automobile Aerospace and Agricultural Implement Workers of

America and all hourly rated production and maintenance employees who are members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America and are employees of the General Motors Corporation. The most recent Pension Agreement between the General Motors Corporation and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America which was effective December 13, 1976, as modified November 22, 1976, and is specifically designated as Exhibit A to Agreement between General Motors Corporation and U.A.W. This Agreement is still effective to this date.

7. The General Motors Corporation is responsible for the maintenance, management and performance of the Pension Plan.

8. Plaintiffs completed and filed the written application and complied with all required provisions to receive pension benefits.

9. All applications and requirements were complied with by the plaintiffs and accepted by the Division of the General Motors Corporation.

10. Plaintiff, Henry Buczynski became eligible for benefits under the Pension Plan on January 1, 1972.

Plaintiff, Alex Borusovic became eligible for benefits under the Pension Plan on March 31, 1973.

All other plaintiffs in this action became eligible for benefits under the Pension Plan prior to July 14, 1977.

11. Article IV, Section 2 of the Supplemental Agreement covering the Pension Plan, more specifically Exhibit

A to the Agreement between the General Motors Corporation and Local 736 of International Union, United Automobile Aerospace and Agricultural Implement Workers of America deals with deduction from the employees pension for Workers' Compensation and reads as follows in whole:

> "In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority."

12. Plaintiff, Henry Buczynski filed a Claim Petition for Workers' Compensation Benefits on June 25, 1976.

Plaintiff, Alex Borusovic filed a Claim Petition for Workers' Compensation Benefits on July 2, 1976.

All other plaintiffs in this action filed Claim Petitions for Wokers' Compensation Benefits prior to July 14, 1977.

13. Plaintiff, Henry Buczynski received a Judgment from his Workers' Compensation Claim on April 7, 1977, entitling him to approximately $2,500.00 (a copy of the judgment is attached herewith).

Plaintiff, Alex Borusovic received a Judgment from his Workers' Compensation Claim on February 11, 1977, entitling him to approximately $2,300.00 (a copy of the Judgment is attached herewith).

All other plaintiffs in this action received Judgments from their respective Workers' Compensation Claims entitling them to various amounts of money for permanent disability.

14. On or about June 22, 1977, plaintiff Henry Buczynski received an Authorization of Adjusted Monthly Benefits calling for an offset or deduction of his Pension Benefits from August 1, 1977, through January 1, 1978. (a copy of the Authorization of Adjusted Monthly Benefits is attached herewith).

On or about June 22, 1977, plaintiff Alex Borusovic received an Authorization of Adjusted Monthly Benefits calling for an offset or deduction of his Pension Benefits from August 1, 1977, through January 1, 1978. (a copy of the Authorization of Adjusted Monthly Benefits is attached hereto).

All other plaintiffs in this action have received Authorizations of Adjusted Monthly Benefits which indicate the

intent of the defendant to reduce the monthly pension benefit of the plaintiffs.

15. On July 14, 1977, an act concerning Workers' Compensation and amending R.S. 34:15-29, specifically Assembly No. 1309 was signed into law by Governor Brendan Byrne (a copy is attached herewith). This law prohibits deduction from an individuals pension for the right of compensation granted by chapter 34:15-29.

16. Defendant's intention to reduce the pension benefits of plaintiffs Henry Buczynski and Alex Borusovic as well as all other plaintiffs similarly situated is unlawful and will interfere with the plaintiffs' right to collect those monies which the plaintiffs are entitled to.

17. Defendant's intent to reduce the pension benefits of plaintiffs, Henry Buczynski and Alex Borusovic as well as all other plaintiffs similarly situated will create an immediate financial hardship to the plaintiffs.

18. Defendant's intent to reduce the pension benefits of the plaintiffs is unlawful and in violation of Assembly Bill No. 1309.

19. Plaintiffs are entitled to the privilege of receiving and enjoying those monies which they are entitled to under Article II, Section 5 of the Supplement Agreement covering the Pension Plan. Defendant will be depriving and preventing the plaintiffs from the use of those monies thereby do plaintiffs immediate substantial and irreparable harm.

20. The unlawful acts complained of herein will be continued in the future as a means of coercion and duress unless the acts are restrained by this Court.

21. The defendant, General Motors Corporation has and is at the present time advising plaintiffs with pending claims for Workers' Compensation Benefits that their pension benefits will be reduced when plaintiffs receive a judgment from their Workers' Compensation Claims.

22. The character and extent of injury to the plaintiffs is such that damages cannot adequately compensate for the same and plaintiffs have no adequate remedy at law.

23. The unlawful acts of the defendant, General Motors Corporation showing intent to withhold and refusal to pay pension benefits to the plaintiffs is likely to continue unless restrained.

24. As to each item of relief requested and granted greater injury will be inflicted upon the plaintiffs by the denial thereof than will be inflicted upon the defendant by granting thereof.

25. Unless a temporary restraining order will be issued without further notice, immediate substantial and irreparable injury to the plaintiffs will be unavoidable.

WHEREFORE, plaintiffs demand:

1. That the defendant be temporarily and permanently enjoined and restrained as follows:

(A) From withholding any pension monies to which the plaintiffs are entitled to receive.

(B) Permanently enjoining the defendant from directly or indirectly fostering or causing the use or implementation

of Article IV, Section 2 of the Pension Plan now in existence.

(C) Permanently enjoining the defendant, General Motors Corporation from directly or indirectly fostering or causing the use or implementation of a plan which results in the withholding of any pension monies to which the plaintiffs are entitled.

(D) Permanently enjoining the defendant from threatening or coercing plaintiffs in any manner with respect to plaintiffs pension being affected due to their pending Workers' Compensation Claims.

(E) Granting to the plaintiffs such other relief as may be just and equitable.

(F) Awarding to plaintiffs costs of this action.

WEINER, MIRABELLI & GLENNON
By: MARC C. GETTIS
Attorney for Plaintiffs

Complaint

[Official Copy Reprint]

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

Introduced January 19, 1976

By Assemblymen Jackman and Pellecchia

Referred to Committee on Labor, Industry and Professions

AN ACT concerning workmen's compensation and amending R.S. 34:15-29.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R.S. 34:15-29 is amended to read as follows:

34:15-29. The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment *[, *and shall not be set off or deduced from pension benefits or payments*]* **The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.***

2. This act shall take effect immediately.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Signed by Governor Byrne on Thursday, July 14, 1977.

[Other Exhibits and Affidavits Omitted]

Petition for Removal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The Petition of General Motors Corporation, for removal of this action from the Superior Court of New Jersey, Chancery Division, Union County, to the United States District Court for the District of New Jersey, respectfully shows to this Honorable Court:

1. That your Petitioner, General Motors Corporation, is the defendant in a civil action brought against it in the Chancery Division of the Superior Court of the State of New Jersey, Union County, entitled, "Henry Buczynski, Alex Borusovic and other retirees similarly situated, Plaintiffs, vs. The General Motors Corporation, Defendant," a copy of the complaint (and annexed Affidavits) and Order to Show Cause in which action are annexed hereto and made parts hereof as Exhibits A and B, respectively, the same constituting all the process, pleadings, and orders served upon your Petitioner in said action.

2. That the aforesaid action was commenced by the filing of said Complaint and Order to Show Cause on August 5, 1977, said Complaint and Order to Show Cause having been received by your Petitioner on August 9, 1977.

3. That your Petitioner was, at the time of the commencement of the aforesaid action, and now is, a cor-

poration duly organized and existing under and by virtue of the laws of the State of Delaware, and an employer and the administrator of an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, and was and is engaged in commerce within the meaning of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a).

4. That the aforesaid action is a suit alleging a violation of the rights of the plaintiffs under a contract between an employee and a labor organization representing employees in an industry affecting commerce and an action by a participant or beneficiary of an employee pension benefit plan to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, within the meaning of Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a), and a civil action of which the United States District Courts have original jurisdiction under and pursuant to the provisions of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a), Section 502(e) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), and 28 U.S.C. §1331, and a civil action which may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441.

5. That your Petitioner files and presents herewith a bond, with good and sufficient surety, in the penal sum of Five Hundred Dollars ($500.00), conditioned, as required by 28 U.S.C. §1446(d), that Petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this cause is not removable or is improperly removed.

Petition for Removal

WHEREFORE, your Petitioner prays that this cause proceed in this Court as an action properly removed thereto.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant-Petitioner
General Motors Corporation
By LAURENCE REICH
A Member of the Firm

Dated: August 9, 1977

Answer

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

Defendant, General Motors Corporation, by way of answer to the Complaint of the plaintiff herein, says that:

1. It admits that it has places of business at 1300 Raritan Road, Clark, New Jersey, 1016 West Edgar Road, and Parkway Avenue, Trenton, New Jersey, and that plaintiffs Henry Buczynski and Alex Borusovic were formerly hourly employees of defendant; except as so admitted, it neither admits nor denies the allegations of paragraph 1.

2. It admits the allegations of paragraph 2.

3. It has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3, and, therefore, it neither admits nor denies the same.

4. It admits that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is recognized by it as the collective bargaining representative of all or substantially all of its hourly-rated production and maintenance employees at its New Departure—Hyatt Bearings Division plant at Clark, New Jersey, its GM Assembly Division plant at Linden, New Jersey, and its Fisher Body Division at Trenton, New Jersey; except as so admitted, it neither admits nor denies the allegations of paragraph 4.

5. It admits that plaintiff Alex Borusovic was employed by it on or about July 16, 1951, and retired from its em-

ploy effective April 1, 1973, and that plaintiff Henry Buczynski was employed by it on October 10, 1938, and retired from its employ effective January 1, 1972; except as so admitted, it has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 and, therefore, it neither admits nor denies the same.

6. It admits that on or about November 19, 1973, it entered into a Supplemental Agreement Covering the Pension Plan which is Exhibit A to an Agreement between it and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, of the same date, which Supplemental Agreement, as modified November 22, 1976, is presently in effect, and that there were agreements between it and said Union prior thereto covering the same subject matter; except as so admitted, it neither admits nor denies the allegations of paragraph 6 and refers to said Supplemental Agreement for accuracy as to the contents thereof.

7. It neither admits nor denies the allegations of paragraph 7, and refers to the aforesaid Supplemental Agreement for accuracy as to the contents thereof.

8. It admits the allegations of paragraph 8 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

9. It admits the allegations of paragraph 9 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

Answer

10. It admits the allegations of paragraph 10 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic, except that plaintiff Alex Borusovic became eligible for benefits April 1, 1973; except as so admitted, it neither admits nor denies the allegations thereof.

11. It admits that paragraph 11 sets forth the text of Section 2 of Article IV of the aforesaid Supplemental Agreement; except as so admitted, it neither admits nor denies the allegations of said paragraph 11 and refers to said Supplemental Agreement for accuracy as to the contents thereof.

12. It admits the allegations of paragraph 12 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

13. It admits the allegations of paragraph 13 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

14. It admits the allegations of paragraph 14 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

15. It admits that on July 14, 1977, Assembly Bill No. 1309 was signed by the Governor of the State of New Jersey and thereby became Chapter 156 of the Public Laws of the State of New Jersey of 1977 and that the copy of Assembly Bill No. 1309 annexed to the Complaint sets forth

in substance the contents thereof; except as so admitted, it neither admits nor denies the allegations of paragraph 15 and refers to said Assembly Bill No. 1309 for accuracy as to the contents thereof.

16. It denies the allegations of paragraph 16.

17. It denies the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

20. It denies the allegations of paragraph 20.

21. It denies the allegations of paragraph 21.

22. It denies the allegations of paragraph 22.

23. It denies the allegations of paragraph 23.

24. It denies the allegations of paragraph 24.

25. It denies the allegations of paragraph 25.

First Separate Defense

The Complaint fails to state a claim upon which relief may be granted by this Court.

Second Separate Defense

Plaintiffs are barred and estopped by the action of their duly authorized collective bargaining representative in en-

tering into the Supplemental Agreement Covering the Pension Plan which is Exhibit A to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, from contending herein that defendant may not make deductions conforming to the provisions of Section 2 of Article IV thereof.

THIRD SEPARATE DEFENSE

1. The Supplemental Agreement Covering Pension Plan which is Exhibit A to the Agreement between General Motors Corporation and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, is an employee benefit plan described in Section 4(a) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. §1003(a), and not exempt under Section 4(b) of ERISA, 29 U.S.C. §1003(b).

2. By reason of the foregoing, the provisions of ERISA supersede the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977.

3. By reason of the foregoing, plaintiffs are barred and estopped from asserting that any actions taken by defendant, General Motors Corporation, pursuant to the provisions of Section 2 of Article IV of said Supplemental Agreement, violates the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as

amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977, or any other law of the State of New Jersey.

FOURTH SEPARATE DEFENSE

1. Defendant, General Motors Corporation, is an employer engaged in commerce within the meaning of the provisions of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 *et seq.*

2. By reason thereof, the provisions of said Act preempt and supersede any state laws applicable to collective bargaining agreements negotiated between employers and the collective bargaining representatives of their employees, including specifically, but not limtied to, Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977.

3. By reason of the foregoing, plaintiffs are barred and estopped from asserting that any actions taken by defendant, General Motors Corporation, pursuant to the provisions of Section 2 of Article IV of said Supplemental Agreement, violates the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977, or any other law of the State of New Jersey.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By LAURENCE REICH
A Member of the Firm

Dated: September 13, 1977

Stipulation dated December 5, 1977

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

IT IS, on this 5th day of December, 1977, Stipulated and Agreed, by and between the undersigned counsel for plaintiffs and defendant in the above-entitled action, as follows:

1. Article IV, Section 2, of the General Motors Hourly-Rate Employes Pension Plan (hereinafter referred to as the "Pension Plan") as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, is the same provision as that contained in Article IV, Section 2, of the predecessor Pension Plans constituting Exhibit A-1 to the Agreements between said parties, dated November 19, 1973, and November 11, 1970, except that the 1970 version thereof included the words "to an employee who retires with benefits payable for months commencing on or after April 1, 1971," following the word "Plan." True copies of Article IV, Section 2, as it appeared in the 1970, 1973, and 1976 versions of the Pension Plan are annexed hereto and made part hereof as Exhibits A, B, and C, respectively.

2. The application of Article IV, Section 2, of the Pension Plan to a particular retired employee is determined by the effective date of his retirement. Any employee who retired with benefits for months commencing on or after April 1, 1971 would be subject to the provisions of Article

IV, Section 2, as constituted in the 1970, 1973, and 1976 versions of the Pension Plan.

LESTER WEINER
Attorney for Plaintiffs

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

EXHIBIT A

Art. IV, 1(b)

therein, shall be considered as benefits for age or disability under the Federal Social Security Act for the purposes of the Plan.

(c) If an employe is eligible for a Federal Social Security benefit for disability or an unreduced Federal Social Security benefit for age at the time of retirement or thereafter, such employee shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan to an employe who retires with benefits payable for months commencing on or after April 1, 1971, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe

by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

EXHIBIT B

Art. IV, 1(c)

retirement or thereafter, such employe shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law,

equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

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(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Article V

Financing

Section 1. Trust Fund

The Corporation shall execute a trust agreement with a trustee or trustees selected by the Corporation to

retirement or thereafter, such employee shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

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Article V

Financing

Section 1. Trust Fund

The Corporation shall execute a trust agreement with a trustee or trustees by the Corporation to

Memorandum Opinion dated February 17, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

I. Introduction

The instant action was originally commenced in the Superior Court of the State of New Jersey, Chancery Division, Union County. It was removed by the defendant to this court pursuant to 28 U.S.C. § 1441,[1] after which the plaintiffs moved for a temporary restraining order on the basis of their complaint in the state action. At that point, the Attorney General of the State of New Jersey moved to intervene.[2] Subsequently, the court informed

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[1] 28 U.S.C. § 1441 provides in pertinent part that:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

[2] The Attorney General of the State of New Jersey submitted a memorandum of law to the court going to the merits of plaintiffs' motion for a preliminary injunction, which has been fully considered by this court. The court has also taken into account the oral argument made before this court by a representative of the Attorney General which also went to the merits of plaintiffs' motion for a preliminary injunction.

the parties of its intention to treat plaintiffs' motion as one for a preliminary injunction, and the parties agreed thereto. A hearing was held, at which time the parties were given an opportunity to present evidence in support of their respective positions. Thereafter, plaintiffs moved to have their action certified as a class action[3]. The parties have supplemented the record of this case with a stipulation of facts.

Thus, three motions are presently pending before this court: (1) plaintiffs' motion for a preliminary injunction; (2) the Attorney General's motion to intervene; and (3) plaintiffs' motion to have the instant action certified as a class action. These motions wll be considered seriatim.

II. The Motion for a Preliminary Injunction

On a motion for a preliminary injunction the moving party must demonstrate (1) a reasonable probability of eventual success in the litigation and (2) that he will be irreparably injured *pendente lite* if the motion is denied. Two other factors which will be weighed, when relevant, are (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest. *Oburn* v. *Shapp,* 521 F.2d 142, 147 (3d Cir. 1975).

The two named plaintiffs in this action are retired employees of the defendant, General Motors Corporation. After they retired, they began receiving monetary payments from the defendant pursuant to a pension plan

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[3] The plaintiff and defendant have signed a consent order certifying the present action as a class action under Fed.R.Civ.P. 23 and have submitted the order to this court for its approval.

agreement[4] negotiated between the defendant and plaintiffs' union, the International Union, United Automobile Aerospace and Agricultural Implement Workers of America. The pension plan provides in relevant part as follows:[5]

> In determining the monthly benefits payable under this Plan to an employe who retires with benefits payable for months commencing on or after April 1, 1971, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason

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[4] The parties have stipulated that "the application of . . . [a] Pension Plan to a particular retired employee is determined by the effective date of his retirement." Stipulation, ¶2. Consequently, this court concludes that plaintiffs' pension rights were negotiated while the plaintiffs were still employees of the defendant, and that those rights were not renegotiated by the union on behalf of the plaintiffs after the plaintiffs retired. From that, this court concludes as a matter of law that the pension plan which governs the rights and liabilities of the plaintiffs is the pension plan which was in effect at the time the plaintiffs retired. *Allied Chemical & Alkali Workers* v. *Pittsburgh Glass Co.,* 404 U.S. 157, 181 n.20 (1971); *Hurd* v. *Hutnik,* 419 F.Supp. 630, 654 (D.N.J. 1976).

Plaintiff Buczynski retired on January 1, 1972, and plaintiff Borusovic retired on April 1, 1973. At the time they retired, a pension plan was in effect which had been negotiated and agreed upon by the defendant and plaintiffs' union on November 11, 1970. The pension plan, rather than the two subsequent pension plans, dated November 19, 1973 and November 22, 1976, is the plan which governs the rights and liabilities of the plaintiffs.

[5] Pension Plan of November 11, 1970, Article 1, Section 2. *See* n.4, *supra.*

of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

Each of the plaintiffs recovered a worker's compensation award pursuant to New Jersey's Worker's Compensation Act, N.J.S.A. 34:15, and each of the plaintiffs' pension benefits was reduced by the defendant in accordance with the above-quoted provision of the pension plan.

The plaintiffs seek a preliminary injunction enjoining the defendant from making the deductions in their retirement pension benefits on the ground that a recently enacted amendment to New Jersey's Worker's Compensation Act

outlaws such deductions[6]. That amendment provides as follows[7]:

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[6] The plaintiffs do not contend that the defendant is making deductions contrary to the three exceptions of subdivisions (a), (b) and (c) of Article IV, Section 2, of the Pension Plan. Rather, the plaintiffs argue that the deductions are being made in violation of the "unless prohibited by law" language of Article IV, Section 2 of the Pension Plan. Plaintiffs' theory is that the recently enacted amendment to New Jersey's Worker's Compensation Act outlaws the deductions being made by the defendant, and that defendant is therefore in breach of the pension plan agreement, which provides that such deductions can be made "unless prohibited by law."

The plaintiffs' action, then, is one for breach of a collective bargaining agreement, pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which provides that:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Suits for breach of a collective bargaining agreement are governed by federal law and "arise under" a federal statute, the National Labor Relations Act, as amended. *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557 (1968).

Since plaintiffs' cause of action "arises under" a federal statute, and since this court would have had original jurisdiction over that cause of action had plaintiffs chosen to institute suit in this court in the first instance, this court has removal jurisdiction under 28 U.S.C. § 1441(a), (b). *See* n.1, *supra.*

[7] Assembly Bill No. 1309, enacted into law on July 14, 1977.

Memorandum Opinion dated February 17, 1978

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. R.S. 34:15-29 is amended to read as follows:

34:15-29. The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments.*

2. This act shall take effect immediately.

The defendant admits that the deductions it is making in plaintiffs' retirement pension payments are violative of the above-quoted New Jersey statute. However, the defendant contends that the statute is unconstitutional under the Supremacy Clause of the United States Constitution in that it is pre-empted by two federal statutes, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA), and the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 151 *et seq.* (NLRA).

If the New Jersey statute is pre-empted by either of those federal statutes, the defendant is acting properly pursuant to the terms of the collective bargaining agreement with plaintiffs' union, and plaintiffs' motion for a preliminary injunction must be denied. If, on the other hand, the New Jersey statute is not pre-empted by either

of those federal statutes, the defendant is in breach of its collective bargaining agreement with plaintiffs' union,[8] and plaintiffs would be entitled to the injunctive relief they seek, provided that the other three factors to be considered on a motion for a preliminary injunction weigh in favor of the plaintiff. *Oburn* v. *Shapp, supra.*

This court, however, need not decide at this time whether the New Jersey statute is pre-empted by ERISA or the NLRA, since it is clear that plaintiffs' motion for a preliminary injunction must be denied on the ground that they have failed to demonstrate that they will be irreparably injured *pendente lite* if their motion is not granted. Should it eventually be determined that the plaintiffs are entitled to a permanent injunction against the deductions presently being made in their retirement pension benefits, they can be reimbursed for the money lost during the period of the wrongful withholding. *See generally,* Leubsdorf, "The Standard for Preliminary Injunctions," 91 Harv.L.Rev. 525 (1978).

Accordingly, the plaintiffs' motion for a preliminary injunction is denied.

III. The Attorney General's Motion to Intervene

The Attorney General of the State of New Jersey has moved to intervene to defend the constitutionality of the recent amendment to N.J.S.A. 34:15-29, which the defendant contends is pre-empted by federal law under the Supremacy Clause of the United States Constitution.

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[8] *See* n.6, *supra.*

Memorandum Opinion dated February 17, 1978

Rule 24(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) Permissive Intervention. . . . When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The first sentence of the above quotation was added in 1948 to codify the case of *Securities Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434 (1940), in which the Supreme Court sanctioned official intervention in behalf of the public interest, and to avoid "exclusionary constructions" of Rule 24(b) which some lower courts continued to put on that rule after *Securities Exchange Commission.* 7A Wright & Miller, Federal Practice and Procedure, § 1912, at 547-48.

It is clear that the plaintiffs' claim is grounded upon a state statute, N.J.S.A. 34:15-29, as amended. It is equally clear that the Attorney General of the State of New Jersey has an interest in defending that statute from a constitutional attack made by the defendant. Since intervention by the Attorney General will not "unduly delay or prejudice the adjudication of the rights of the original parties," Fed.R.Civ.P. 24(b), the motion of the Attorney General to intervene is granted. [*See Miami Health Studios, Inc.*

v. *City of Miami Beach,* 491 F.2d 98 (5th Cir. 1974) (intervention of a state attorney general).] *See* Fed.R.Civ.P. 24 (a); 28 U.S.C. §2403(b).

IV. The Motion for Class Action Certification

The parties have submitted a consent order to this court for its approval. The consent order provides as follows:

> ORDERED that this action shall be and is certified as a class action under Rules 23(b)(1) and/or Rule 23(b)(2) of the Federal Rules of Civil Procedure.
>
> It is further ORDERED that the class shall be and is certified as those persons who were employed in New Jersey by General Motors Corporation who are participants in the General Motors Corporation Hourly Rate Employees' Pension Plan who have been, since July 14, 1977, or may hereafter be subject to deductions under Section 2 of Article IV of such Pension Plan from pension benefits payable to them other than disability pension benefits.
>
> It is further ORDERED that the two named plaintiffs, Henry Buczynski and Alex Borusovic, are hereby certified as the representatives of the class.

The court agrees with the parties that the present action should properly be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. However, before the court decides which subdivision of Rule 23 is applicable, and the appropriate class to be certified, I will wish to have the benefit of counsels' written submissions and oral argument. Please address yourselves to what subdivisions of Rule 23 are applicable and why, the mechanics

of notice, and the proper class. With regard to the subject of the proper class, I note that the parties have stipulated that Article IV, Section 2 of the General Motors Hourly-Rate Employes Pension Plan dated November 11, 1970 is identical to Article IV, Section 2 of the Pension Plan dated November 19, 1973 and of the Pension Plan dated November 22, 1976, except that the November 11, 1970 version contains the words "to an employe who retires with benefits payable for months commencing on or after April 1, 1971," following the word "Plan." In other words, all three Pension Plans are the same in all material respects. This raises the question of whether the class should include all retired employees of General Motors who are subject to either the 1970 Pension Plan, the 1973 Pension Plan or the 1976 Pension Plan, and who were employees of General Motors in New Jersey at the time they retired.

You may be able to agree upon a joint submission. In any event, I will want briefs exchanged by February 27, 1978. Oral argument is set down for March 6, 1978 at 9 a.m.

You should also confer and advise the court of whether additional testimony on either side will be required. Among other things, you may wish to consider whether testimony should be offered concerning the history of negotiations relating to the "deduction" language, including the "unless prohibited by law" phrase.

FREDERICK B. LACEY
United States District Judge

Dated: February 17, 1978

Pretrial Order dated April 13, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

April 13, 1978

Newark, New Jersey

Before the Honorable William J. Hunt
United States Magistrate

Appearances:

Marc C. Gettis, Esquire
Lester Weiner & Associates
For Plaintiffs.

Laurence Reich, Esquire
Carpenter, Bennett & Morrissey
For Defendant

1. NATURE OF THE ACTIONS This is an action for injunctive relief against the implementation by defendant of the provisions of Article IV, Section 2, of the General Motors Corporation Hourly-Rate Employees Pension Plan so as to deduct certain New Jersey Workers Compensation Act benefits payable to plaintiffs and other members of the class represented by plaintiffs from retirement benefits payable to such person under such Pension Plan. This is an action removed pursuant to 28 U.S.C. §1441 of which this Court has jurisdiction pursuant to 28 U.S.C. §1332, by reason of the provisions of Section 301(a), and Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1).

Pretrial Order dated April 13, 1978

2. EXHIBITS, ADMISSIONS AND STIPULATIONS: Not later than May 8, 1978, counsel will meet and confer and accomplish the following:

(a) All exhibits are to be premarked and each side is to prepare his or its own exhibit list in the usual form used in this court.

(b) A complete set of exhibits is to be exchanged and admissibility agreed upon. Where agreement cannot be reached, the side offering the document should set forth in letter form the exhibit being tendered, why it is admissible, and the objections thereto. This is to be presented to the Honorable Frederick B. Lacey at the time of submission of trial memoranda.

(c) Each side is to come to the aforesaid meeting with his or its proposals for stipulation he or it seeks and at the conclusion of the meeting a stipulation of facts is to be prepared and signed by all counsel and filed with the Clerk of the United States District Court not later than May 10, 1978.

3. FACTUAL AND LEGAL CONTENTIONS OF PLAINTIFFS: See attached.

4. FACTUAL AND LEGAL CONTENTIONS OF DEFENDANT: See attached.

4A. FACTUAL AND LEGAL CONTENTIONS OF THE INTERVENOR, STATE OF NEW JERSEY: None submitted.

5. CLAIMS AS TO DAMAGES: Plaintiffs' request injunctive relief, enjoining and restraining the defendant from implementing Article 4, Section 2 of the Pension Plan. Each

individual plaintiff should be entitled to damages in the amount of the deductions which have been made from his pension. Plaintiffs also seek costs from defendant in this action.

6. AMENDMENTS TO THE PLEADINGS: On February 21, 1978, the Honorable Frederick B. Lacey ordered that the State of New Jersey may intervene as a defendant herein. On March 26, 1978, the court granted the plaintiffs' motion to certify this action as a class action.

7. LEGAL ISSUES: Validity and enforceability of N.J.S.A. 34:15-29, as amended by Chapter 156 of Public Laws of the State of New Jersey of 1977 in view of preemption by the provisions of Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a); propriety of injunctive relief, damages.

8. LEGAL ISSUES ABANDONED: None.

9. ADDITIONAL DISCOVERY: None.

10. BRIEFS: Counsel are to submit not later than May 10, 1978, comprehensive trial memoranda setting forth in detail the names of the witnesses each intends to call, the background of each witness, and a detailed recital of the testimony each witness will give. Each memorandum will also contain in its factual portion an analysis of all the documentation which will be submitted. Each memorandum will deal comprehensively as well with applicable law. Preliminaray proposed findings of fact and conclusions of law will accompany the submission of trial memoranda.

11. MOTIONS: The parties may file cross-motions for summary judgment.

Pretrial Order dated April 13, 1978

12. Opening and Closing: Usual order.

13. Expert Witnesses: None.

14. Estimated Length of Trial: Counsel have noted in their respective pretrial memoranda that this action can be determined on the pleadings, affidavits, and the stipulation before the court as well as on the briefs and oral argument.

15. Trial Counsel:

For the Plaintiffs: Lester Weiner & Associates

For the Defendant General Motors: Laurence Reich, Esq.

For the Defendant State of New Jersey: Michael S. Bokar, Esq.

16. Trial Date: This matter has been listed for trial before the Honorable Frederick B. Lacey on May 15, 1978.

William J. Hunt
United States Magistrate

Factual Contentions of Plaintiffs

This is a class action brought by plaintiffs against General Motors Corporation. The class consists of those persons who are retired members of the General Motors Corporation Hourly Rate Retirees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automo-

bile, Aerospace and Agricultural Implement Worker's of America, dated November 11, 1970, November 19, 1973 or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971 and who at the time of their retirement, were employed by General Motors Corporation in New Jersey. The defendant has deducted and continues to deduct from plaintiffs' retirement pensions (General Motors Hourly Rate Retirees Pension Plan Exhibit A to agreement between General Motors Corporation and UAW) in the amounts of judgments which these plaintiffs have collected from defendant for occupational injuries, in the New Jersey Department of Labor and Industry, Division of Worker's Compensation.

Article IV, Section 2 of the Pension Plan allows such deductions, "unless prohibited by Law." Chapter 156 of the New Jersey Laws of 1977 prohibits these deductions. The defendant has continued to make said deductions, alleging that the New Jersey statute is preempted under section 514(a) of E.R.I.S.A. and under section 301 of the N.L.R.A.

Plaintiffs contends that this action is not preempted by section 514(a) of E.R.I.S.A., but rather fits within the exception of section 514(b) of E.R.I.S.A., in that plaintiffs have causes of action which arose prior to January 1, 1975 and defendant committed certain acts and omissions before January 1, 1975. The defendant's acts and omissions consisted of operating their three New Jersey plants where the plaintiffs were exposed to loud noise and deleterious substances, resulting in compensable disabilities. Plaintiffs collected for these disabilities, but defendant subsequently deducted these amounts from plaintiff's pensions. The plaintiffs are before this Court in an attempt

to re-coup these same monies and to enjoin defendant's conduct.

Plaintiffs contend that the State statute is not preempted under the N.L.R.A. The Statute is not contrary to the agreement between the parties but rather is incorporated therein under the "unless prohibited by law" clause. The statute was enacted for the purpose of regulating Worker's Compensation, an area of local interest and responsibility, where the State still has the power to act and regulate. The law is a legislative attempt to guarantee workers their rights under the Worker's Compensation laws.

Plaintiffs also contend that preemption of the state statute would deprive these plaintiffs of any legal remedy for injuries arising in the course of employment. Worker's Compensation laws abrogate any common law right. Preemption of the statute would effectively deny plaintiffs their rights under Worker's Compensation, since any payments thereunder could be offset against the employees pensions.

Since Chapter 156 of the laws of 1977 is a proper exercise of State power and is not preempted under Federal Law, the defendant has been acting in violation of the law.

Injunctive relief is the proper remedy for the plaintiffs in this action. For most of these plaintiffs, the monthly pension is the sole source of income, with the exception of Social Security. Deductions from pension benefits is causing these plaintiffs irreparable harm for which an injunction is the appropriate remedy.

Pretrial Order dated April 13, 1978

FACTUAL AND LEGAL CONTENTIONS

The applicable facts herein are not disputed. At all times since April 1, 1971, to and including the date hereof, the General Motors Corporation Hourly-Rate Employes Pension Plan (hereinafter referred to as the "Pension Plan") adopted by defendant and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, applicable to plaintiffs and other members of the class represented by plaintiffs, as provided, in Article IV, Section 2 thereof, for the deduction from benefits otherwise payable under the Pension Plan of certain Workmen's Compensation payments payable to a retired employee thereunder. Such deductions have been made by defendant in accordance with such provision of the Pension Plan, both prior and subsequent to July 14, 1977, the date of enactment and effective date of Chapter 156 of the Public Laws of the State of New Jersey of 1977, which amended the New Jersey Workers Compensation Act, N.J.S.A. 34:15-29, to provide that:

> "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

Plaintiffs contend that defendant is prohibited by N.J.S.A. 34:15-29, as amended, from making deductions from retirement pension benefits otherwise payable to plaintiffs and other members of the class represented by plaintiffs after July 14, 1977 pursuant to Section 2 of Article IV of the Pension Plan. Defendant contends that insofar as it purports to apply to the Pension Plan, which is an employee benefit plan described in Section 4(a) of the Employee Retirement Income Security Act of 1974,

Pretrial Order dated April 13, 1978

P.L. 93-406 (hereinafter referred to as "ERISA"), 29 U.S.C. §1003(a), and not exempt under Section 4(b) of ERISA, 29 U.S.C. §1003(b), N.J.S.A. 34:15-29, as amended by Chapter 156 of the Laws of 1977, is superseded and preempted by reason of the provisions of Section 514(a) of ERISA, 29 U.S.C. §1144(a). Therefore, N.J.S.A. 34:15-29 may not be applied so as to preclude deductions by defendant from retirement pensions of plaintiffs and other members of the class represented by plaintiffs in accordance with the provisions of Section 2 of Article IV of the Pension Plan.

Stipulation, dated May 9, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

IT IS, on this 9th day of May, 1978, STIPULATED AND AGREED, by and between the undersigned counsel for plaintiffs and defendant in the above-entitled action, as follows:

1. The Stipulation of the parties dated December 5, 1977 and filed herein December 7, 1977, be and it hereby is incorporated herein by reference, and, the Pension Plans of which Exhibits A, B, and C thereto are part are hereby designated Joint Exhibits A, B, and C in this action.

2. Defendant is an employer engaged in commerce or in an industry or activity affecting commerce.

3. The plaintiffs herein are all persons formerly employed by defendant in New Jersey who, on various dates on or after April 1, 1971, retired from the employ of defendant under the provisions of the General Motors Hourly-Rate Employes Pension Plan (hereinafter and in the aforesaid Stipulation dated December 5, 1977 referred to as the "Pension Plan"). All of the named plaintiffs have received awards of benefits under the New Jersey Workers' Compensation Act. All of the named plaintiffs have had deductions made by defendant from the pension benefits otherwise payable to them under the Pension Plan since July 14, 1977 by reason of the receipt of such awards and in accordance with the provisions of Section 2 of Article IV of the Pension Plan.

Stipulation, dated May 9, 1978

4. It is stipulated and agreed, without any stipulation or agreement as to the relevance or significance thereof, that Joint Exhibits D and E are true copies of Section 2 of Article IV of the 1958 and 1961 Pension Plans, respectively.

LESTER WEINER
Attorney for Plaintiffs

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By LAURENCE REICH
A Member of the Firm

Order Certifying Class Action, dated August 9, 1978

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(Hon. Frederick B. Lacey)

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

This matter having been opened to the Court by Lester Weiner, Esq., attorney for plaintiffs, on the application of plaintiffs for an order certifying the above-entitled action as a class action, and the Court noting the consent of the parties hereto to the entry of this Order, and good cause appearing,

IT IS, on this 9th day of August, 1978,

ORDERED, that this action be and it hereby is certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure; and it is

Order Certifying Class Action, dated August 9, 1978

FURTHER ORDERED, that the class be and it hereby is certified as consisting of those persons who are retired members of the General Motors Corporation Hourly-Rate Employes Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, datad November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey; and it is

FURTHER ORDERED, that the above-entitled action be and it hereby is set down for Pretrial Conference before Honorable William J. Hunt at 9:00 A.M. on April 10, 1978, and for trial before this Court on May 1, 1978.

FREDERICK B. LACEY, U.S.D.J.

We hereby consent to the making and entry of the foregoing Order.

LESTER WEINER
Attorney for Plaintiffs
By: MARC C. GETTIS

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

JOHN J. DEGNAN
Attorney General of the State of New Jersey
Attorney for Intervenor
By: MICHAEL S. BOKAR
Deputy Attorney General

Memorandum Opinion, dated August 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

Plaintiffs in this class action[1] are retired employees of defendant General Motors Corporation who had been re-

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[1] The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." See order filed August 9, 1978.

ceiving retirement pension benefits from the defendant pursuant to a pension plan negotiated between the defendant and plaintiffs' union. After the plaintiffs received worker's compensation payments pursuant to New Jersey's Worker's Compensation Act,[2] the defendants reduced the plaintiffs' benefits under the plan by an amount equal to those payments, pursuant to Article IV, Section 2, of the plan.

The plaintiffs contend that the defendant cannot lawfully make such deductions in their pension benefits. They seek reimbursement of all pension benefits thus withheld and a permanent injunction against all such future deductions which are predicated upon the receipt of worker's compensation payments.

For the reasons set forth below, the plaintiffs are entitled to the relief they seek.

Dealing first with the issue of subject matter jurisdiction in this removed matter, 28 U.S.C. § 1441, I conclude I have such jurisdiction to decide the issues. Even were there any question about the propriety of removal by the defendant, neither side has questioned it. Since it is clear I would have had original jurisdiction over the claims presented here, a valid judgment can be entered with respect to them.[3] *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972).

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[2] N.J.S.A. 34:15 *et seq.*

[3] Thus, this court would have had original subject matter jurisdiction over the instant action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) and under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(f), 1132(a)(3).

Moreover, this court has removal jurisdiction over plaintiffs' state court action under 28 U.S.C. § 1441(a)(b), predicated upon 29 U.S.C. § 185(a).

Memorandum Opinion, dated August 24, 1978

The complaint as filed alleges that the plaintiffs are retired employees of the defendant, that they have been receiving pension benefits under a Pension Plan Agreement between their union and the defendant, that they have obtained judgments entitling them to worker's compensation benefits, and that the defendant threatens to reduce their pension benefits because they have recovered worker's compensation benefits. The complaint sets forth Article IV, Section 2 of the Pension Plan Agreement:

> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

The complaint then alleges that the deductions threatened by the defendant are now in violation of a recent amendment to New Jersey's Worker's Compensation Act[4] which provides that:[5] "The right of compensation granted by this chapter may bet set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The complaint concludes with a prayer for a permanent injunction against the threatened deductions.

Plaintiffs' action, therefore, is predicated upon an alleged breach or violation of the "unless prohibited by law" clause of the Pension Plan Agreement.[6] Thus they argue that, since Article IV, Section 2 of the Pension Plan Agreement bars the defendant from offsetting pension benefits against worker's compensation benefits where "prohibited by law," and the New Jersey Worker's Compensation Act embodies such a prohibition, the continued deductions violate the express provisions of the Pension Plan Agreement.

The complaint did not advance a claim founded upon a theory that the offset provision is unlawful under ERISA. That claim was first raised indirectly when plaintiffs' counsel brought to this court's attention the recently decided

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[4] There is no allegation that defendant threatens to make the deductions in plaintiffs' pension benefits contrary to the three exceptions to the offset provision contained in subdivisions (a), (b), or (c) of Article IV, Section 2 of the Pension Plan Agreement.

[5] L. 1977, c. 156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29.

[6] Subsequent to the filing of the complaint, the defendant has been making the deductions in plaintiffs' pension benefits and has made it clear that it will continue to do so.

Utility Workers Union of America v. *Consumers Power Co.*, No. 7-71747 (E.D.Mich., filed June 13, 1978). The defendant's response was not a claim of prejudice by reason of a belated addition to plaintiffs' bag of legal theories of recovery.[7] Instead, the defendant responded by referring the court to another case[8] in the same court, the Eastern District of Michigan, which was decided contrary to the *Utility Workers* case.

The defendant, as I have noted, admits all of the material allegations necessary to a decision on the question of whether ERISA itself bars the offset involved, including that the pension plan falls within the coverage of ERISA. *See* 29 U.S.C. § 1003.

Thus, I perceive no prejudice to the defendant in addressing the issue of the lawfulness of the offsetting in question under 29 U.S.C. § 1053 of ERISA. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil, § 1219.[9]

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[7] The defendant contended only that the ERISA claim was "entirely outside the scope of the pleadings and proof now before the court" and that the *Utility Workers* case was therefore irrelevant. Letter to Court, dated July 26, 1978.

[8] *Bordine* v. *Evans Product Co.*, No. 7-71652 (E.D. Mich., filed April 6, 1978).

[9] Once a federal court has removal jurisdiction, a party may amend his complaint to assert a federal claim that could not have been presented in the state court. *Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943). This court has removal jurisdiction over plaintiffs' breach of contract claim which was asserted in state court. *See* n.3 *supra*. Thus, under *Freeman*, the plaintiffs could have amended their complaint here to assert the unlawfulness of the offset provision under ERISA, 29 U.S.C. § 1053, a claim over which this court has original subject matter jurisdiction under 29 U.S.C. § 1132(f).

Memorandum Opinion, dated August 24, 1978

The Offset Provision of the Pension Plan Is Unlawful Under ERISA

The minimum vesting standards provision of ERISA, 29 U.S.C. § 1053, provides in pertinent part that:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefits is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.[10]

• • •

[10] Subparagraph (B) provides for an alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service. For example, an employee who has served at least 5 years would have a nonforfeitable right to 25% of his accrued benefit, while an employee who had served at least 15 years would have a nonforfeitable right to 100% of his accrued benefit.

(Footnote continued on following page)

Memorandum Opinion, dated August 24, 1978

In *Utility Workers,* it was held that a provision in a pension plan falling within the coverage of ERISA which provides that retirement pension benefits are to be offset against worker's compensation benefits is unlawful under ERISA, 29 U.S.C. § 1053. This court is in full agreement with the well-reasoned opinion in that case.[11]

Under ERISA, a pension plan must provide that an employee's rights in his accrued benefits derived from his own contributions is nonforfeitable.[12] The pension plan must also provide that an employee has a nonforfeitable right to a certain percentage of his accrued benefit derived

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(Footnote continued from preceding page)

Subparagraph (C) provides for yet a third alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service and his age. For example, where an employee has served at least 5 years and the sum of his age and service is at least 45, he has a nonforfeitable right to 50% of his accrued benefit; but where an employee has at least 10 years of service and the sum of his age and service is at least 55, he has a nonforfeitable right to 100% of his accrued benefit.

It is immaterial whether plaintiffs' pension plan is one predicated upon subparagraph (A), (B), or (C) of 29 U.S.C. § 1053 (a)(2).

[11] This court rejects the contrary holding in the case of *Bordine, supra* note 9, at 4.

[12] ERISA does not provide for any exceptions to the nonforfeitability requirement in the case of accrued benefits derived from employee contributions.

from employer contributions,[13] the particular percentage depending upon (1) his years of service or (2) his years of service and his age.

When a pension plan, such as the one under consideration here, makes the employee's right to a certain percentage of his accrued benefit derived from employer contributions conditional upon a factor other than years of service or years of service and age, the plan is unlawful, unless the factor is one of those set forth in 29 U.S.C. § 1053(a)(3).

The pension plan herein makes the plaintiffs' rights to their accrued benefits conditional upon their not obtaining worker's compensation benefits. Such a factor is not one of those set forth in 29 U.S.C. § 1053(a)(3).[14] As a result, the pension plan is unlawful.[15]

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[13] The court will assume that plaintiffs' pension plan is fully funded by the defendant.

[14] 29 U.S.C. § 1053(a)(3) legalizes pension plans which provide that an employee's right to an accrued benefit is forfeitable if he dies, if he is employed in certain types of industries, if certain amendments are made retroactive, or if he withdraws any amount attributable to the benefit derived from mandatory contributions made by him.

[15] In addition to *Utility Workers, see also Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d Cir. 1977).

Memorandum Opinion, dated August 24, 1978

The Offset Provision of the Pension Plan Is Void Under the "Unless Prohibited By Law" Clause of the Pension Plan

As noted previously, the Pension Plan Agreement between the defendant and the plaintiffs' union provides that retirement pension benefits may be offset against worker's compensation benefits "unless prohibited by law." At the final hearing in this case on May 15, 1978, the testimony established that after a number of years' absence from the General Motors' pension plan, the offset provision reappeared in the 1970 pension plan.[16] The testimony also established that it was the defendant which proposed the reinsertion of the offset provision into the pension plan because there had been a "deluge" of worker's compensation cases from which the defendant sought "relief."[17] The "unless prohibited by law" clause was also proposed by the defendant. The "unless prohibited by law" clause "meant just as the language indicated, pure and simple, that if there were states then having state laws which prohibited an offset and if in the future there would be state laws that prohibited offset that would be applicable and it was just that pure and simple.[18]

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[16] The offset provision was continued in the 1973 and 1976 pension plans. All three plans contain the "unless prohibited by law" clause. Stipulation of December 7, 1977.

[17] Testimony of Hubert Clodfelder, Union Negotiator, Hearing of May 15, 1978, Tr. at 8. The pension plan being negotiated was to apply to 130 General Motors' plants located in at least thirty states.

[18] *Id.* at 10.

The defendant admits that the deductions it is making in plaintiffs' retirement pension benefits are prohibited by the recent amendment to New Jersey's Worker's Compensation Act. The defendant contends, however, that that amendment is unconstitutional under the Supremacy Clause of the United States Constitution, in that it has been preempted by ERISA, 29 U.S.C. § 1144(a),[19] which provides that:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

As I have already indicated in the preceding section of this opinion, the offset provision of the pension plan is unlawful under ERISA, 29 U.S.C. § 1053. The New Jersey statute, insofar as it is merely duplicative of ERISA, is preempted by that federal statute. *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

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[19] The defendant also contends that the New Jersey statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.* This contention, however, is without merit, since the parties specifically agreed that the offset provision of the pension plan would be inapplicable if it was prohibited by state law. By applying the recent amendment to New Jersey's Worker's Compensation Act to bar the offset of pension benefits against worker's compensation benefits, this court would be doing nothing more than enforcing the agreement between the parties reached after the give and take of collective bargaining.

However, assuming *arguendo* that ERISA does not outlaw the offset provision of the pension plan, it becomes necessary to determine whether the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), renders the New Jersey statute null and void as applied to the facts of this case. If the New Jersey statute is not preempted by ERISA, the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the recent amendment to New Jersey's Worker's Compensation Act became effective on July 14, 1977.

In determining whether the New Jersey statute is pre-empted,[20] this court is guided by the opinion of the Court of Appeals for the Third Circuit in the case of *Rogers* v. *Larson, supra* at 620-21, wherein the court discussed the three preemption "tests":

> The Supreme Court has . . . established three grounds upon which a local statute may be deemed pre-empted by federal law. It will be pre-empted (1) if "Congress has unmistakenly so ordained," or (2) if "the nature of the regulated subject matter permits no other conclusion" but pre-emption, or (3) if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of

[20] The court reiterates that this discussion is predicated upon the assumption that the offset provision of the pension plan is *not* unlawful under ERISA.

> the full purposes and objectives of Congress." (citation omitted)[21]

The touchstone of all three preemption tests is Congressional intent to preempt. *Rogers* v. *Larson, supra* at 621 n.8.

The defendant contends that the New Jersey statute is preempted under the first preemption test, in that Congress, through the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), "unmistakenly" intended to preempt this state law.[22]

It is true that under ERISA, 29 U.S.C. § 1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New

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[21] With respect to the last two tests, the court explained that:

> We understand the second test to mean that the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation.
>
> The third test is applied when there is room in the subject area for both federal and local regulation. This test requires the court to examine both statutory schemes to determine if they can co-exist or if they conflict.

Rogers v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

[22] The defendant does not argue that the New Jersey statute is preempted under either preemption test (2) or (3). It is clear to this court that the statute is not preempted under either of those tests.

Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. § 1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. *See Allied Structural Steel Co.* v. *Spannaus,* 46 U.S.L.W. 4887, 4889 n.8 (U.S. June 28, 1978); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 n.1 (U.S. April 3, 1978); *Marshall* v. *Chase Manhattan Bank,* 558 F.2d 680, 683 (2d Cir. 1977). However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. This is clear from the language of the statute itself. The statute provides that worker's compensation benefits may be set off against *disability* pension benefits, but not against *retirement* pension benefits. Thus, under the statute an employee is not entitled to double compensation for a work-related disability, once under the Worker's Compensation Act, and once under his pension plan. On the other hand, an employee *is* entitled to be compensated at least *once* for his work-related disability. It is self-evident that if an employee can receive compensation for his work-related disability under New Jersey's Worker's Compensation Act just to have an equal amount taken away from his retirement pension benefits, the employee, in reality, has been deprived of compensation for his work-related disability.[23] *Utility Workers Union*

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[23] It is obvious that an employer could not justify, upon any rational basis, giving one employee less retirement pension benefits than another employee solely on the basis that the former employee has a work-related disability while the latter does not.

of America v. *Consumers Power Co., supra,* slip op. at 16 n.12. The New Jersey statute forbids such a result.

Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. § 1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here. That Congress recognizes state law preeminence in the field of worker's compensation law is clear from ERISA itself which exempts from the coverage of ERISA an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws. . . ." 29 U.S.C. § 1003(b)(4).[24]

That New Jersey had a strong interest in enacting the recent amendment to its Worker's Compensation Act cannot be denied. That Act "was intended to place the cost of accidental injuries which are work-connected upon employers, who may provide for them as operating expenses. *Renshaw* v. *United States Pipe & Foundry Co.,* 30 N.J. 458 (1959); *Tocci* v. *Tessler and Weiss, Inc.,* 28 N.J. 582 (1959)." *Daniello* v. *Machise Express Co.,* 119 N.J. Super 20, 24 (LawDiv. 1972), *aff'd,* 122 N.J. Super 144 (App. Div. 1973). Where a disability is compensable under that statute, a common law suit by the employee against his employer is unavailable. *Dudley* v. *Victory Lynn Lines, Inc.,* 32 N.J. 479 (1960). Consequently, if an employer can avoid his statutory duty to provide compensation to his

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[24] This court assumes that plaintiffs' pension plan is not such a plan. Nevertheless, 29 U.S.C. § 1003(b)(3) is relevant to determining Congressional intent with respect to the term "relate to" in 29 U.S.C. § 1144(a).

employees for work-related disabilities, the employee is without any remedy at all. If an employer can reduce an employee's retirement pension benefits by an amount equal to the employee's award of worker's compensation disability benefits, the employer has accomplished just that—he has avoided his statutory obligation to compensate the employee for his work-related disability. Thus, New Jersey had a strong interest in closing that "loophole" in its Worker's Compensation Act by enacting the recent amendment under consideration here.

In *Farmer* v. *Carpenters,* 430 U.S. 290, 302 (1977), the Supreme Court stated that:

> Our cases indicate, however, that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

While it is true that the Court in that case was speaking of the National Labor Relations Act, as amended, which, unlike ERISA, does not contain specific preemptive language, the statement is nevertheless relevant in discerning Congressional intent with respect to the term "relate to" in ERISA, 29 U.S.C. § 1144(a).

The State of New Jersey's substantial interest in enacting the recent amendment to its Worker's Compensation Act has already been demonstrated. Moreover, this court cannot discern how that amendment threatens any interference with the federal regulatory scheme of ERISA, let alone undue interference. Finally, since the amendment simply does not relate to pension plans *qua* pension plans, but is instead directed towards protecting an em-

ployee's right to worker's compensation benefits, this court concludes that Congress did not intend to preempt the amendment by enacting ERISA and the preemptive language of 29 U.S.C. § 1144(a).[25]

CONCLUSION

I hold as follows:

1. Plaintiffs are entitled to the relief they seek because the offset provision of their pension plan is unlawful under ERISA, 29 U.S.C. § 1053.

2. Assuming *arguendo* that Congress did not outlaw the offset provision by enacting ERISA, Congress did not intend ERISA to prohibit the states from outlawing such offset provisions. Consequently, the plaintiffs are entitled to the relief they seek because the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the State of New Jersey amended its Worker's Compensation Act on July 14, 1977 so as to prohibit offsets of retirement pension benefits against worker's compensaiton benefits.

FREDERICK B. LACEY
United States District Judge

Dated: August 24, 1978

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[25] Plaintiffs' contention that 29 U.S.C. § 1144(a) is inapplicable to the case at bar by reason of 29 U.S.C. § 1144(b)(1) is without merit. That provision provides as follows:

> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

Consequently, this court has found it necessary to consider the meaning of 29 U.S.C. § 1144(a) as applied to the facts of this case.

Opinion, dated December 20, 1978

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

The defendant moves for reconsideration of this court's decision embodied in an opinion and order filed August 24, 1978. That decision invalidated reductions by the defendant in the pension payments made to the plaintiffs in an amount equal to the value of payments received under the New Jersey Worker's Compensation Act, N.J.S.A. 34:15 *et seq.* Struck down was the pension plan's provision allowing this offset, Article IV, Section 2, on two separate grounds: first, that the offsets were unlawful under 29 U.S.C. § 1053; second, even if Congress did not forbid these pension deductions, New Jersey was not barred by the preemption doctrine from passing a law which effectively

outlawed this offset under the "unless prohibited by law" clause of the plan.

The defendant, in its motion to reconsider, challenges both rationales upon which the earlier decision was grounded.

29 U.S.C. § 1053

The defendant's action, I previously had held, violated the minimum vesting section of ERISA, 29 U.S.C. § 1053, by failing to make nonforfeitable the plaintiffs' rights to their retirement benefits. The defendant, arguing that the offsets do not constitute a forfeiture within the meaning of ERISA, relies on Treas. Reg. § 1.411(a)-4(a), which provides:

> Furthermore, nonforfeitable rights are not to be considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Two courts have applied this regulation to hold that deducting worker's compensation payments from pension payments does not offend ERISA's nonforfeitability requirement. *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978).[1]

Plaintiffs have placed in issue the validity of the aforesaid regulation. Although Treasury Regulations are ac-

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[1] *Contra, Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 455 n.11 (E.D. Mich. 1978).

corded great respect and are not lightly overruled, *see Bingler* v. *Johnson,* 394 U.S. 741, 479-51 (1969), a Treasury Regulation that is inconsistent with Congressional enactments cannot stand. *United States* v. *Cartwright,* 411 U.S. 546, 557 (1973). A regulation will be struck down if it is inconsistent with the plain wording of a federal statute, *Busse* v. *Commissioner,* 479 F.2d 1147, 1152-53 (7th Cir. 1973), or if the regulation "conflict[s] with the philosophy and avowed purpose of legislation." *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995, 999 (D.N.J. 1965), *aff'd,* 362 F.2d 551 (3d Cir. 1966) (per curiam). Thus, the existence of a regulation does not end the inquiry.

First, the plaintiffs claim the Secretary of the Treasury is powerless to prescribe regulations affecting pension rights under 29 U.S.C. § 1053. This contention is without merit.

Thus, 29 U.S.C. § 1202(c) provides:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 . . . shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

Treas. Reg. § 1.411(a)-4(a) was issued to give guidance in interpreting 26 U.S.C. § 411; and 29 U.S.C. § 1053, entitled "minimum vesting standards," is located in part 2 of subtitle B of subchapter I. Accordingly, the Secretary of the Treasury had the authority to promulgate a binding regulation regarding § 1053.

Next to be considered is whether the aforesaid regulation is consistent with ERISA. The defendant's argument that it is requires careful analysis. First, the defendant points to 26 U.S.C. § 401, which states the requirements

for qualifying a pension plan. One requirement is that the plan be nondiscriminatory. A plan is not considered discriminatory "merely because the contributions or benefits . . . differ because of any retirement benefits created under State or Federal law." § 401(a)(5). In interpreting this statute, the Internal Revenue Service has ruled that a plan could provide that worker's compensation benefits could be offset against pension benefits without the plan being discriminatory. Rev.Rul. 68-243. Next, the defendant notes that Congress, in enacting ERISA, did not modify of 26 U.S.C. § 401(a)(5). Also, Congress explicitly stated that it "intend[ed] that the anti-discrimination rules of present law in areas other than the vesting schedule are not to be changed." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5058. Thus, defendant argues, because the pre-ERISA rules permitted deductions for worker's compensation benefits and this policy regarding nondiscrimination was continued by Congress, it therefore follows that Treas. Reg. § 1.411(a)-4(a) is consistent with ERISA generally and with § 1053 in particular.

This convoluted skein of reasoning is unconvincing. First, it is questionable that Congressional intent concerning 26 U.S.C. § 401 indicates anything at all about Congressional intent as to nonforfeitability under § 1053. *See Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 n.3 (2d Cir. 1977). The legislative history of ERISA underscores this. Under the heading of "permitted forfeitures of vested rights," Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S.

Code Cong. & Ad. News 5038, 5052. The report then lists a series of exceptions to the principle that an employee's vested rights are not forfeitable. None of these exceptions mention worker's compensation.

Another difficulty with the defendant's interpretation results from ERISA's handling of the term nonforfeitable. 29 U.S.C. § 1002(19) provides the definition.[2] Under this section only the exceptions specifically included in § 1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in § 1053 (a)(3) are exceptions to § 1002's definition of nonforfeitability. *See Riley* v. *MEBA Pension Trust, supra,* 570 F.2d at 409; *Utility Workers Union* v. *Consumer Powers Co., supra,* 453 F.Supp. at 456; *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976).

Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. *See United States* v. *Bacto-Undisk,* 394 U.S. 784 (1969); *New York Shipbuilding Corp. supra.* Treas. Reg. §1.411(a)-

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[2] The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in § 1053(a)(3) of this title.

4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.[3]

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[3] The defendant makes two other arguments to sustain its position. Noting that the same phrase appears in both 26 U.S.C. § 401 (a)(5) and in 29 U.S.C. § 1082(c)(4)(A), the defendant takes this as evidence of the continued vitality of Rev.Rul. 68-243, which upheld offsets for Worker's Compensation as not being discriminatory for the purposes of 26 U.S.C. § 401(a)(4), suggesting that § 1053 also allows offsets. As was said in *Utility Workers Union, supra*: "The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language." 453 F.Supp. at 456.

The defendant also refers the court to 29 C.F.R. § 2605, stressing the language in the definitions in subsection 2:

> "Pension Benefit" means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves . . . which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

Under this regulation, the defendant argues, the Pension Benefit Guarantee Corporation (PBGC) has authorized reducing pension benefits if worker's compensation is provided. This regulation suffers from the same defects as does the Treasury Regulation, (Treas, Reg. § 1.411(a)-4(a), except that it is without a statutory basis and derives no support from the legislative history.

N.J.S.A. 34:15-29

The defendant also argues that the court erred in finding that the New Jersey law forbidding the offsets[4] (L. 1977, c.156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29) was not preempted by ERISA. The Third Circuit Court of Appeals recently enumerated the three grounds for preempting a state statute. In its motion for reconsideration, the defendant strongly contends that the New Jersey statute is invalid due to the second ground: "'the nature of the regulated subject matter permits no other conclusion' but pre-emption." *Rogers* v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), *appeal filed*, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978) (citations omitted). Elaborating further, the court stated that this basis for preemption existed when "the subject matter of the federal and local laws . . . must inherently either conflict or be dupli-

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[4] The defendant again argues that preemption should be found under 29 U.S.C. § 1144(a) because the New Jersey law "relates to" pension plans. The defendant cites several cases in which preemption has been found. While those cases are useful in illuminating the Congressional intent underlying ERISA, the cases are not dispositive. "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (citations omitted). The same is also true with respect to the state regulation in question, for whether preemption by ERISA can be found will depend on the exact nature of the state laws. *Compare* National Carriers' Conference Comm. v. Heffernan, 454 F.Supp. 914 (D. Conn. 1978) *and* Standard Oil Co. of Cal. v. Agsauld, 442 F.Supp. 695, 707 (N.D. Cal. 1977) *with* Stone v. Stone, 450 F.Supp. 919, 931-33 (N.D. Cal. 1978) *and* Gast v. State, 47 U.S.L.W. 1067 (Oct. 31, 1978 Oregon). The court's conclusion that the New Jersey Worker's Compensation Law does not "relate to" pensions will be adhered to. *See also* Johnston v. Johnston, 47 U.S.L.W. 2331 (Oct. 27, 1978 California).

cative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation." *Id.*

For the purpose of analyzing preemption, this court, in its earlier opinion, assumed *arguendo* that ERISA did not forbid the offsets and that the New Jersey law was not on its face inconsistent with the federal enactment. If Congress had plainly declared that deductions for worker's compensation payments were allowed, or if the New Jersey law frustrated the Congressional purpose, then the Supremacy Clause would compel the striking down of New Jersey's law. *Ray* v. *Atlantic Richfield Co.*, 46 U.S.L.W. 4200, 4201 (1978). Thus, in treating the preemption question, it will continue to be assumed that Congress has not addressed the permissibility of offsets, either to allow them or to prohibit them.[5] Under this assumption, it is clear the New Jersey statute is not preempted, based upon the wording of the second ground of *Rogers* v. *Larson, supra.* It neither duplicates nor conflicts with ERISA.

This conclusion, aside from being compelled by *Rogers* v. *Larson, supra,* also follows from general principles of preemption. In a field historically falling within the sphere of state regulation, preemption will not be found unless a clear Congressional intent to preempt is found. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As determined in my earlier opinion, that clear expression

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[5] Consonant with the earlier opinion, the court still views the legislative history as being one consistent with the forbidding of offsets. To the extent that this history reveals Congressional intent to be unclear, in no way can the legislative history be said to support the contrary conclusion, that offsets were to be permitted.

of intent is absent. New Jersey's statute lies within the allowable range of police activity that gives rise to the presumption against preemption.

> States possess broad authority under their police power to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmen's compensation laws* are only a few examples.

De Canas v. *Bica,* 424 U.S. 351, 356 (1976) (emphasis added)

After noting that the California statute challenged as being preempted belonged in the category of traditional state police powers, the Court found no preemption under the preemption test that "the nature of the . . . subject matter permits no other conclusion." *Id.,* quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). *Rogers* v. *Larson, supra,* derives from this portion of *De Canas* its second ground for preemption; this shows that New Jersey's strong interest in worker's compensation will be a significant factor militating against finding preemption.

Another important rule in deciding preemption cases is that state and federal regulatory schemes should be harmonized, if possible. "[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127 (1973). The Court then went on to hold that California could apply its statute voiding restraints on competition,

despite the fact that the rule which the petitioner sought to enforce had been promulgated pursuant to federal statute. The Court observed that "California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme." *Id.* at 139-40.

Accordingly, given that the New Jersey statute neither duplicates nor conflicts with ERISA, that Worker's Compensation forms an area of strong public interest to New Jersey, see Memorandum Opinion at 9-10, and that the court is under a duty due to the nature of the federal system to try to validate proper exercises of the state police power, preemption does not exist. The offsets by the defendant are therefore barred by the "unless prohibited by law" clause.

CONCLUSION

Upon reconsideration, the previous decision of this court is followed.

FREDERICK B. LACEY
United States District Judge

Dated: December 20, 1978

Order, dated December 20, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL 77-1644

Defendant having moved for reconsideration of this court's decision of August 24, 1978, and reconsideration having been given;

IT IS HEREBY ORDERED this 20th day of December, 1978 that the previous decision of this court embodied in the opinion of August 24, 1978 is adhered to.

FREDERICK B. LACEY
United States District Judge

Letter Opinion, dated March 28, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Frederick B. Lacey
Judge

United States Court House
Newark N. J. 07101

March 28, 1979

Lester Weiner Associates
325 Westfield Avenue, E.
Roselle Park, NJ 0724

Carpenter, Bennett & Morrissey, Esqs.
744 Broad Street
Newark, NJ 07102

Re: Buczynski v. General Motors Corporation
Civil No. 77-1644

Gentlemen:

Plaintiffs brought this suit challenging the defendant's policy of offsetting workers' compensation awards against pension payment. On August 24, 1978 this court issued an opinion granting the plaintiffs the relief they sought. This decision was adhered to in an opinion issued on December 20, 1978 on the defendant's motion for reconsideration. The parties are now before the court after having made various motions concerning the form of the order.

Plaintiffs move for attorneys' fees. 29 U.S.C. § 1132(g) provides that the court may, in its discretion, allow rea-

sonable attorneys' fees. This court, after having examined the affidavits submitted by plaintiff's counsel in support of this motion, finds them deficient under the standards set by the court of appeals of this circuit. Accordingly, the plaintiff's motion is denied without prejudice to renewal upon compliance with this circuit's standards.

Defendant moves for a stay of judgment pending appeal. Fed.R.Civ.P. 62(c) provides that a district court after a final judgment granting an injunction "in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The parties agree as to the criteria to be used in determining whether a stay should be granted—they disagree as to the result in applying those criteria to the defendant's motion. Chief among the criteria is probability of success. The issues presented in this were novel and difficult. This court concludes that there is at least a reasonable probability that the defendant will prevail on appeal. Accordingly, the defendant's motion for a stay will be granted.

Very truly yours,

Frederick B. Lacey

FBL:abw

Order, dated March 28, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL No. 77-1644

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter Bennett and Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorandum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employees Pension Plan; and

IT IS FURTHER ORDERED that defendant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age, (together with interest from the date of deduction) within 30 days from the date of the Order; provided that in the event this court's judgment

that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement benfits (together with interest from the date of deduction) on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

FREDERICK B. LACEY
United States District Judge

Dated: March 28, 1979

Order, dated April 4, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

This Court having filed an Order in the above-entitled cause on March 28, 1979, and good cause appearing,

IT IS on this 4 day of April, 1979,

ORDERED, that the Order filed by the Court herein on March 28, 1979, be and it hereby is withdrawn.

FREDERICK B. LACEY
United States District Judge

Amended Order, dated April 5, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter, Bennett & Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorndum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employes Pension Plan; and

IT IS FURTHER ORDERED that defenant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age (together with interest from the date of deduction) within 30 days from the date of

the Order; provided that in the event this court's judgment that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement plan benefits, other than benefits payable by reason of disability (together with interest from the date of deduction), on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

FREDERICK B. LACEY
United States District Judge

Dated: April 3, 1979

Notice of Appeal, dated April 12, 1979

UNITED STATES DISTRICT COURT
DISTICT OF NEW JERSEY

Civil Action No. 77-1644

NOTICE IS HEREBY GIVEN that General Motors Corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Amended Order entered in this action on the 5th day of April, 1979.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

Dated: April 12, 1979

Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,
Appellees

v.

THE GENERAL MOTORS CORPORATION,
Appellant

STATE OF NEW JERSEY,
Intervenor

(D.C. Civil No. 77-1644)

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,
Appellees

v.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,
Appellants

STATE OF NEW JERSEY,
Intervenor

Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

(D.C. Civil No. 78-0434)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: January 8, 1980

Before: GIBBONS, ROSENN and GARTH, *Circuit Judges*

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Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

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Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

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OPINION OF THE COURT

(Filed February 15, 1980)

GARTH, *Circuit Judge*

These two appeals pose a single question: whether the Employee Retirement Income Security Act of 1974 (ERISA) or the laws of New Jersey invalidate the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute. We conclude that these offset provisions are not unlawful under ERISA, and that the New Jersey statute prohibiting them is preempted by ERISA. We therefore reverse the district court orders which enjoined such offsets and which required payment to pension beneficiaries of those amounts which the pension trustees had offset in the past.

I.

Both these cases present similar fact patterns,[1] and procedural histories. General Motors (GM) and

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1. No material facts are in dispute in either case. In *Alessi*, all facts were stipulated. In *Buczynski*, the parties filed a stipulation of facts and the plaintiffs presented, at the instance of the district

Raybestos-Manhattan (Raybestos) maintain pension plans covered by ERISA, 29 U.S.C. §1001 *et seq.* (1976). Both pension plans provide that, under certain circumstances, benefits will be reduced by the amount of Workmen's Compensation payments received by plan participants.[2]

NOTE 1 — *(Continued)*
court, the testimony of Hubert Clodfelter. Clodfelter was a union negotiator for the United Auto Workers in 1970 when the GM pension plan was under consideration. He testified about the meaning of the "unless prohibited by law" clause in the GM offset provision. *See* note 2 *infra*.

2. The GM offset clause provides:

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may

In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective July 14, 1977, added the underscored sentence to N.J. Stat. Ann. §34:15-29 (Supp. 1979), a part of New Jersey's Workmen's Compensation program. The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after this statute went into effect, the plaintiffs brought class actions[3] against the defendants in the

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be enacted from time to time, which payments are paid concurrently with the Retirement Income.

3. In *Alessi*, the request for class certification was abandoned after the case was removed to the federal courts, and the action was continued on behalf of the named plaintiffs only. In *Buczynski*, the following class was certified by consent of the parties:

> The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." *See* order filed August 9, 1978.

Buczynski v. General Motors Corp., 456 F. Supp. 867, 868 n.1 (D.N.J. 1978).

New Jersey state courts. The named plaintiffs in each suit were former employees of the defendants who had recovered Workmen's Compensation judgments against the defendants and whose pension benefits were being reduced as a result.[4] The suits sought permanent injunctions against the offsets and recoupment damages for those offsets, alleged to be unlawful, which had already been made.

Both cases were removed by the defendants to the United States District Court for the District of New Jersey. Both district judges to whom the respective cases were assigned, reached the same result. The district court judge in *Buczynski* issued two published opinions. The first opinion is reported at 456 F. Supp. 867 (D.N.J. 1978). The second opinion, which denied reconsideration, is reported at 464 F. Supp. 133 (D.N.J. 1978). The district court judge in *Alessi* issued a single, unpublished letter opinion.

Although the complaints in both cases challenged the offsets only on the basis of the New Jersey statute, both courts found the offset invalid under §203(a) of ERISA, 29 U.S.C. §1053(a) (1976) (hereinafter §1053(a)). In so holding, both courts invalidated a regulation issued by the Treasury Department expressly authorizing the offset clauses, 26 C.F.R. §1.411(a)-4(a) (1979).[5] They also held that the New Jersey statute was

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4. One of the *Alessi* plaintiffs, Helen Vogt, had not yet begun to receive her plan benefits (which were deferred termination benefits rather than retirement payments) by the time suit was filed, and thus had not yet suffered the impact of the offset clause. She was scheduled to begin receiving termination benefits on February 1, 1979.

5. The *Buczynski* court's first opinion made no mention of the Treasury regulation. The regulation was only considered and found invalid in the opinion responding to GM's motion for reconsideration. *See* 464 F. Supp. at 134-36.

not superseded by ERISA's preemption clause, 29 U.S.C. §1144 (1976).[6]

General Motors and Raybestos bring these appeals, challenging the district courts' conclusions that the offsets are invalid under ERISA and that the New Jersey statute is not preempted. We address these issues in turn.[7]

II.

The plaintiffs claim that the defendants' offset is rendered unlawful by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). This section provides in pertinent part:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is

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6. The *Buczynski* court also held that it need not reach the preemption claim since it had already found that the offset was invalid under ERISA itself. *See* 456 F. Supp. at 872. Preemption was discussed, however, by assuming *arguendo* that the offset was *not* invalid under ERISA, *see id.* The court concluded that the New Jersey statute was not preempted, *id.* at 872-74.

After the *Buczynski* and *Alessi* opinions were issued, still another opinion of the district court of New Jersey addressing these questions was filed. Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). *Carpenter* diverged from *Buczynski* and *Alessi* by holding that ERISA did, indeed, preempt the New Jersey statute. *See* our discussion *infra* at Part III. The *Carpenter* court reached the same result as its predecessors, however, by holding that the Workmen's Compensation offset was prohibited by ERISA itself.

7. The State of New Jersey has intervened in both *Alessi* and *Buczynski*. In addition, several *amicus* briefs have been filed in *Buczynski*. The United States as *amicus* urges reversal of the district court. So do several steel companies, who are involved in litigation on this same issue in the Western District of Pennsylvania. These steel companies are: Crucible, Inc., Jones & Laughlin Steel Corp., Mesta Machine Co., Pullman-Standard, Shenango, Inc., United States Steel Corp., and Wheeling-Pittsburgh Steel Corp. The individual steelworkers, who are suing their employers on this issue, urge affirmance. The steelworkers are Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller, and George Zihol. The Gray Panthers, one of the *amici* permitted to file in *Buczynski*, urge affirmance as well.

nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

A Treasury regulation, however, addresses the permissibility of offsets under ERISA's antiforfeiture provision and expressly authorizes such offsets, declaring them *not* to be prohibited forfeitures. This regulation provides in pertinent part:[8]

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which

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8. This Treasury regulation was *not* issued under ERISA's antiforfeiture requirement found at 29 U.S.C. §1053(a) (1976), but rather under an antiforfeiture provision included in the Internal Revenue Code requirements for pension plans, 26 U.S.C. §411(a) (1976). The tax code requirement for pension plans was enacted in Title II of ERISA. ERISA expressly provides that Treasury Department regulations under the tax code pension provisions shall apply to the analogous provisions of ERISA codified in Title 29 of the United States Code. 29 U.S.C. §1202(c) (1976) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter [which include 29 U.S.C. §1053(a)]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

We thus conclude that the Treasury regulation issued under the antiforfeiture requirement of 26 U.S.C. §411(a) (1976) must, if valid, control our interpretation of 29 U.S.C. §1053(a) (1976) as well. None of the parties here contends otherwise. This issue is discussed at greater length in Baker v. Otis Elevator Co., No. 79-1185, slip. op. at 5-8 (3d Cir., Nov. 13, 1979).

> are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. §1.411(a)-4(a) (1979).

In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry with this regulation, which, if held to be valid, would require us to sustain the offset provisions in the General Motors and Raybestos pension plans.

A.

In assessing the validity of 26 C.F.R. §1.411(a)-4(a) (1979), we first turn to a consideration of the character of the regulation. In this court's recent opinion in *Baker v. Otis Elevator Co.*, No. 79-1185 (3d Cir., Nov. 13, 1979), which also concerned the validity of a Treasury regulation interpreting a provision of ERISA, we recognized a distinction between two types of administrative regulations, with a corresponding distinction in the appropriate standard of review. We there stated:

> There can be no question but that the regulation with which we are here concerned is a legislative regulation which was issued pursuant to a clear delegation of rule making authority, *see* U.S.C. §1202(c) (1976). As Professor Davis has explained,
>
> > A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.
> >
> > The distinction between the two kinds of rules is fundamental. . . . Valid legislative rules have about the same effect as valid statutes; they are binding on courts. . . .
> >
> > [By contrast, however,] [c]ourts always have power to substitute their judgment for ad-

> ministrative judgment as to the content of interpretative rules, but they refrain in varying degrees from substituting judgment in various circumstances . . . .
>
> 2 K.C. Davis, Administrative Law Treatise, §7:8 at 36-37 (1979). We recognize the distinction in the nature of the two types of rules, leading in turn to a distinction in our standard of review. Our scope of review of legislative rules is far more restricted than the scope of our review of interpretative rules. *See id.*, at 37.

Slip. op. at 9-10.

After an analysis of the Supreme Court's decision in *Batterton v. Francis*, 432 U.S. 416 (1977), which addressed the same issue, we concluded in *Baker* that, to sustain a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole," slip op. at 11-12.

As in *Baker*, the Treasury Department regulation at issue here is plainly legislative in nature; it was issued pursuant to the same delegation of rule-making power as the regulation in *Baker*, which was there held to be legislative. *See* slip op. at 9; 29 U.S.C. 1202(c) (1976). It is thus subject to the limited review prescribed in *Baker*.[9]

The plaintiffs contend that the Treasury regulation must be struck down because it is inconsistent with the

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9. Neither district court here recognized that 26 C.F.R. §1.411(a)-4(a) (1979) is a *legislative* regulation. Other courts that have invalidated this regulation have failed as well to recognize this salient characteristic. *See* note 10 *infra*. By failing to accord this regulaton the appropriate degree of deference, these courts have impermissibly substituted their own judgment as to the interpretation of the statute for that of the Treasury Department.

governing statutory provision, ERISA's antiforfeiture requirement, 29 U.S.C. §1053(a) (1976). Before turning to their claim, we think it is appropriate to acknowledge that fidelity to the standard of review set forth in *Baker* and *Batterton, supra*, requires that a legislative regulation be invalidated only for a clear and manifest conflict with the governing statute. Overturning a legislative regulation where the statute may arguably be given conflicting readings, or where the conflict between the regulation and the statute is not plain, does violence to the congressional intent to delegate rule-making authority to the administrative agency. Approached from this perspective, the conclusions reached by the district courts in *Buczynski* and *Alessi*, that the regulation is inconsistent with 29 U.S.C. §1053(a) (1976), cannot be sustained: The legislative history affirmatively supports the Treasury regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation.

B.

The district courts here, as well as the other courts that have invalidated this regulation,[10] make similar syllogistic arguments to demonstrate the conflict with ERISA which they perceive. They begin with §1053(a), which provides broadly that pension benefits must be

10. In addition to *Buczynski* and *Alessi*, offset provisions have been declared unlawful, and the Treasury regulation has been invalidated, in Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wis. 1979); Utility Workers' Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978), *appeal docketed*, No. 78-1402 (6th Cir., August 2, 1978); and Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). Offset provisions, and the Treasury regulation authorizing them, have been *upheld* in Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978); Pavlovic v. Chrysler Corp., No. 7-70438 (E.D. Mich., Jan. 10, 1978), and Carlson v. Bundy Corp., No. 6-72272 (E.D. Mich. 1977).

nonforfeitable. They then focus on §1053(a)(3), which specifically exempts certain pension plan provisions from the nonforfeitability rule. The list of these exceptions includes, *inter alia*, nonpayment of benefits if the plan participant dies, §1053(a)(3)(A), and suspension of benefits if the participant takes a job with an employer in the same industry, §1053(a)(3)(B). This list, however, does not include offsets for Workmen's Compensation. Finally, these district courts add to §1053(a) the definition of "nonforfeitable" found in 29 U.S.C. §1002(19) (1976), which provides:

> (19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions *shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.* (emphasis added).

Armed with these provisions, these district courts reason as follows: all reductions in benefits are forfeitures; all forfeitures are prohibited by §1053(a), with the sole exceptions being those listed in §1053(a)(3); Workmen's Compensation offsets are not included in the list of permissible forfeitures in §1053(a)(3); *ergo*, Workmen's Compensation offsets are prohibited forfeitures. Thus, they conclude that the Treasury regulation authorizing offsets for benefits provided under Federal or State law is in conflict with ERISA, and is therefore invalid, because it expands the class of permissible forfeitures beyond those specifically set forth in

§1053(a)(3). The *Buczynski* district court, in its second opinion, makes the argument as follows:

> Another difficulty with the defendant's interpretation results from ERISA's handling of the term "nonforfeitable". 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability.
>
> Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. Treas.Reg. §1.411(a)-4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.

464 F. Supp. at 135-36 (footnotes and citations omitted).

Thereafter, the district court in *Alessi*, relying on the *Buczynski* opinions, reached the same result. *See Alessi v. Raybestos-Manhattan*, No. 78-0434, slip op. at 5 (D.N.J., Feb. 15, 1979).

While this argument is not without some superficial appeal, the courts' syllogism is defective, and we must reject it. Understanding this defect, however, requires some explanation of the regulation of pension plans by the Internal Revenue Service before and after ERISA was enacted.

Prior to enactment of ERISA in 1974, the Internal Revenue Code set forth a variety of requirements that had to be met by pension plans in order to qualify for fa-

vorable tax treatment. One requirement was that the plans be nondiscriminatory. This tax code requirement was set forth in 26 U.S.C. §401(a)(4) & (5). On the passage of ERISA, these sections were amended, but the amendments did not alter the basic aim of the statute. Discrimination in contributions or benefits under a pension plan was still prohibited. These sections now provide in pertinent part:

> (a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—
>
> (A) officers,
>
> (B) shareholders, or
>
> (C) highly compensated.
>
> * * *
>
> (5) . . . [A] plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of the employees under the plan . . . differ because of any retirement benefits created under State or Federal law. . . .

Under these sections, the IRS prior to ERISA had extensive experience with a pension plan provision similar to the offset clause challenged here. That provision was the offset of Social Security benefits against pension benefits. In its interpretation of the clause excerpted above from 26 U.S.C. §401(a)(5), the IRS had long permitted pension plans to offset pension benefits by the amount of Social Security benefits that a plan partici-

pant received. The first such regulation was issued in 1943, and it simply reiterated the statutory language quoted above. The current version of this regulation, issued in 1960, provides as follows:

> (b) A plan . . . under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401-4(b) (1979).

The parties do not dispute that this regulation permits offset of pension benefits by the amount of Social Security benefits received.

In enacting ERISA, Congress was familiar with the practice of the IRS allowing such offset provisions. Congress was also aware that the IRS, while allowing such offsets, would not permit any *increase* in the rate of offset based upon any *increase* in the level of Social Security benefits occurring after a retiree began to receive his pension. Congress sought to codify this administrative practice of not permitting an increased offset based upon *increased* Social Security benefits, and did so by enacting §1021(e) of ERISA, which is codified at 26 U.S.C. §401(a)(l5) (1976). This section provides:

> (l5) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of *any increase* in the benefit levels payable under title II of the Social Security Act or *any increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first re-

ceipt of such benefits or the date of such separation, as the case may be. (emphasis added).

Congress's understanding in enacting this section is made clear in the report of the House Ways and Means Committee:

> Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration [*i.e.*, offset] procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.
>
> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which take place after the date of enactment or on the date of the first receipt of plan benefits or the date of separation from service (whichever is applica) if that date is later.
>
> These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

H.R. Rep. No. 93-807, 3 U.S. Code Cong. & Admin. News 4670, 4695-96 (1974).

Despite certain misgivings about offset, or integration practices expressed later in this report, Congress chose *not* to bar the Social Security offset entirely, but merely to prohibit *increases* in the amount of the offset based on *increases* in the amount of Social Security benefits.

A number of conclusions can be drawn from this history, conclusions which shed light on the analysis on which the *Alessi* and *Buczynski* courts relied in striking down the Treasury regulation. In choosing only to limit *increased* Social Security offsets rather than bar them entirely in §401(a)(15), Congress gave its implicit approval to the practice of permitting offsets against pension plan benefits — in that instance, an offset of Social Security benefits against pension plan benefits. Further, since §401(a)(15) was enacted at the same time as §1053(a)'s requirement that pension benefits be nonforfeitable, we must conclude that the offset of Social Security benefits implicitly approved in the former section was *not* simultaneously rendered illegal by the latter section's requirement of nonforfeitability.

This conclusion reveals the primary defect in the *Buczynski/Alessi* district court analyses. Those courts reasoned, as noted above, that all benefit reductions are forfeitures, and all forfeitures are impermissible except for the four exceptions listed in §1053(a)(3). Yet Congress has approved the Social Security offset, and that offset does not appear among the permissible forfeitures under §1053(a)(3). Thus, the district courts' reasoning runs afoul of Congress's approval of the Social Security offset. If all reductions in benefits are forfeitures, and all forfeitures are prohibited with the exceptions listed in §1053(a)(3), then, under the district courts' reasoning, Social Security offsets should also be prohibited. Yet, as we have seen, this is not the case. It is true, as the courts

reasoned, that all *forfeitures* are prohibited with the exception of those listed in §1053(a)(3), but it *cannot* be true that all reductions in benefits are necessarily forfeitures. Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury regulation in issue here to conflict with §1053(a) is in error.

The plaintiffs contend, however, that the Workmen's Compensation offset cannot be sustained on the strength of Congress's approval of the Social Security offset. They contend that even if the Social Security offset is not a forfeiture under ERISA, the Workmen's Compensation offset *is*. Social Security benefits and pension benefits, they point out, are both designed to compensate for wages lost as a result of old age, and therefore the Social Security offset simply avoids a duplication of benefits directed to the same end. Workmen's Compensation, by contrast, is designed to compensate for losses flowing from employment related injuries; thus, the Workmen's Compensation offset, unlike the Social Security offset, cannot be defended as a means to avoid duplication of benefits.

The plaintiffs' argument here fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities, see* 42 U.S.C. §423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless. The disability offset, included within the Social Security offset, thus compels us to reject any purported distinction between Social Security offsets and Workmen's Compensation offsets.

And the same argument may be made with respect to benefits provided under the Railroad Retirement Act, 45 U.S.C. §231 *et seq.* (1976). The same implicit congressional approval of offsets of Social Security benefits that appears in 26 U.S.C. §401(a)(15) (1976) is accorded to offsets of Railroad Retirement Act benefits in 29 U.S.C. §1056(b) (1976).[11] Railroad retirement benefits include payments for disability as well as payments for old age. *See* 45 U.S.C. §231a(a)(1)(iv) & (v) (1976). Thus, Congress has implicitly approved two disability offsets against retirement payments. As a result, reliance on the difference in the character of the offsets (retirement benefits as opposed to disability benefits) is misplaced.

The conclusion that not all benefit reductions are forfeitures; that, specifically, a Social Security offset is not a forfeiture; and that the district courts' reasoning is erroneous, is enough by itself to require upholding the Treasury regulation under the review of legislative regulations prescribed by *Baker v. Otis Elevator* and *Batterton v. Francis*. Once we conclude that Social Security offsets are not forfeitures, in the absence of clear evidence that Congress intended to prohibit Workmen's Compensation offsets, it cannot be said that a regulation allowing Workmen's Compensation offsets is so contrary to ERISA that it cannot stand. Thus, we conclude that there is an insufficient basis on which to strike down the regulation.

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11. 29 U.S.C. §1056(b) provides in pertinent part:

> [A] plan may not *decrease* benefits of such a participant by reason of any increase in the benefit levels payable under title II of the *Social Security Act or the Railroad Retirement Act of 1937*, or any *increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (emphasis added).

C.

Our conclusion that a proper interpretation of ERISA requires giving binding effect to this regulation receives further support in the legislative history of the Act. That history demonstrates to our satisfaction that Congress did not disapprove of Workmen's Compensation offsets as well as Social Security offsets.

In the course of IRS administration of the nondiscrimination requirement for pension plans under 26 U.S.C. §401(a)(4) & (5) (1976), the Service issued a revenue ruling explicitly approving an offset for Workmen's Compensation:

> Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.
>
> The effect of section 401(a)(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar program, to be used for comparative purposes. *See* Part 4(j) of Revenue Ruling, 65-178, C.B. 1965-2, 94. A program, like the social security program, that requires employer contributions and makes benefits available to the general public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.
>
> Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

> Since the benefits payable under a *workmen's compensation law or occupational diseases law* are available to the general public, it is held that *benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan* in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer. (emphasis added).

Rev. Rul. 68-243, 1968-1 C.B. 157, 158.

The substance of this ruling has been republished by the IRS on two occasions.[12]

The legislative history of ERISA indicates that Congress was familiar with the IRS rules on integration of benefits in pension plans, and intended that these rules

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12. In 1969, the IRS published an extensive Revenue Ruling consolidating and updating the rules on qualification of pension plans under 26 U.S.C. §401 (1976). This ruling contained the same position expressed in Revenue Ruling 68-243:

> (4) *Integration With Benefits Provided Under Other Public Programs.* — Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. *See* Rev. Rul. 68-243, C.B. 1968-1, 157. (emphasis added).

Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 61, 72.

This same provision was included without change in a special IRS publication in 1972. Internal Revenue Service, Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

be preserved. The report of the Conference Committee states:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Conf. Rep. No. 93-1280, 3 U.S. Code Cong. & Admin. News 5038, 5058 (1974).

This history of IRS practice with respect to Workmen's Compensation offsets, and of congressional preservation of the antidiscrimination rules, suggests that, if anything, Congress approved of Workmen's Compensation offsets. Thus, the evidence indicates that the Treasury regulation in issue here conforms to congressional intent. Accordingly, because the regulation is not contrary to §1053(a) and the provisions of ERISA as a whole, we must sustain its validity.[13]

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13. An additional argument in support of the position taken by GM and Raybestos was made by the *amicus* steel companies. They called our attention to a proposal made in Congress by Senators Harrison Williams and Jacob Javits, two of the original sponsors of ERISA. The proposal, if enacted into law, which it was not, would have prohibited Workmen's Compensation offsets. The proposal states:

> (a) Section 206(b) of such Act [ERISA] is amended
>
> . . . .
>
> (3) by adding at the end thereof the following new sentence: "A pension plan may not reduce or suspend retirement pension benefits being received by a participant or beneficiary or retirement pension benefits in which a participant who is separated from the service has a nonforfeitable right by reason of any payment made to the participant or beneficiary by the

III.

Our conclusion that the Treasury regulation must be sustained does not, by itself, require granting judgment in favor of the defendants. For even if ERISA does not prohibit the Workmen's Compensation offset in the GM and Raybestos pension plans, New Jersey's 1977 statute *does*. This statute, as noted earlier, provides in relevant part:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off

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employer maintaining the plan as the result of an award or settlement made under or pursuant to a workers' compensation laws."

As we understand the argument, the steel companies contend that there would have been no need for the introduction of such a proposal unless ERISA as originally enacted, and as currently in force, permitted Workmen's Compensation offsets.

While certainly plausible, we do not attribute much weight to this argument. The difficulty with it, as with all arguments of this nature, is that the understanding of the amendment's sponsors is open to conflicting interpretations. It is possible that the sponsors believed that such offsets were permissible under the original ERISA. It is also possible, however, that they believed that such offsets were *impermissible* under ERISA as enacted, and sought the amendment to override the Treasury regulation that erroneously, in their view, authorized such offsets. Thus, the argument cuts both ways.

Two additional arguments, attacking our conclusion that the regulation is valid, are made by *amici* Gray Panthers and Steelworkers. Neither of these arguments merits discussion. They argue that the regulation conflicts with 29 U.S.C. §1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated," and with 29 U.S.C. §1103(c)(1) (1976), which provides that "the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." In our opinion, the discussion and analysis found in part II, *supra*, which demonstrates an overriding congressional intent to permit Workmen's Compensation offsets against pension benefits, disposes of these contentions as well.

against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

N.J. Stat. Ann. §34:15-29 (Supp. 1979).

The statute, of course, prohibits the offset clause challenged here, and the defendants do not contend otherwise. They do claim, however, that this statute is superseded by ERISA's preemption provision, 29 U.S.C. §1144(a) (1976).[14] This section states:

(a) Except as provided in subsection (b) of this section,[15] the provisions of this subchapter and subchapter III of this chapter shall supersede any

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14. The State of New Jersey, which has intervened in both *Buczynski* and *Alessi*, asks us to abstain from deciding the preemption question. It suggests that if we await a New Jersey state court interpretation of the statute, it may obviate our consideration of the preemption claim. The state suggests that the New Jersey courts are likely to hold that N.J. Stat. Ann. §34:15-29 (Supp. 1979) protects employees who obtained Workmen's Compensation judgments after the statute went into effect. Since all the plaintiffs in *Alessi* and all the named plaintiffs in *Buczynski* recovered their judgments before the effective date of the statute, it does not, New Jersey argues, protect them and there is no need to determine whether the statute is preempted by ERISA.

However, we decline to abstain for two reasons. First, the construction of the statute that New Jersey proposes will not forever remove the need for consideration of the preemption question. It will simply postpone consideration until a claim is made by an employee who recovered a Workmen's Compensation award after July 14, 1977 and it appears to us that such a claim is not far off. Second, and of greater importance, the certified class in *Buczynski* appears to include persons who recovered Workmen's Compensation judgments after the statute's effective date. *See* note 3 *supra*. Thus, there are plaintiffs in this suit who are protected by the statute regardless of how the New Jersey courts may construe the statute. In this posture, then, we are obliged to resolve the preemption claim.

15 None of the exceptions referred to are applicable here, and the plaintiffs do not argue to the contrary.

and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The district court judge in *Buczynski*, despite his conclusion that the offset provision was unlawful under ERISA itself, nevertheless discussed the preemption issue. The district court in *Buczynski*, followed thereafter by *Alessi*, concluded that the New Jersey statute was not preempted:

> It is true that under ERISA, 29 U.S.C. §1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here.

456 F. Supp. at 872-73 (citations omitted).

Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. Ann. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise.[16] The primary purpose of the statute, and its direct effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans (*Buczynski*), or that its effect on such plans is merely collateral (*Alessi*). In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans; this purpose negates the characterization of the statute attributed to it by the New Jersey district courts.

Further, ERISA preempts state statutes that "*relate to* any employee benefit plan," 29 U.S.C. §1144(a) (1976) (emphasis added). The view taken by the *Buczynski* court, that ERISA preempts only statutes concerning "pension plans *qua* pension plans," could be accepted only if ERISA's preemption clause were much more narrowly drawn than it is. Here, the preemption clause, reaching statutes that "relate to" pension plans, has an obviously broader scope

In noting that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," 456 F. Supp. at 872, the district court in *Buczynski* appears to concede the difficulty of its narrow interpretation. The court reasoned, however, that Congress could not have intended the term to be given its full breadth. Yet the legislative history of the clause, as well as the plain meaning of its language, belie this claim. The legislative history of the clause has been de-

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16. As previously noted, *see* note 6 *supra*, still another New Jersey district court has addressed this preemption question, and agrees with our conclusion that the New Jersey statute is preempted by ERISA. *See* Carpenter Technology Corp. v. Boyton, No. 78-1415, slip op. at 5-9 (D.N.J., Dec. 12, 1979).

tailed elsewhere and we need not repeat it here. *See Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). We need only note its most prominent features: that the original House and Senate provisions were significantly narrower, and were rejected by the Conference Committee in favor of the current provision; and that explanations of the Conference substitute given on the floor of both chambers make plain that the preemptive intent is just as broad as its language suggests. Thus, it is clear that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand.[17]

IV.

We conclude that the Workmen's Compensation offset in General Motors's and Raybestos's pension plans is not a forfeiture rendered invalid by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). In so concluding, we sustain the Treasury regulation expressly authorizing provisions of this type, 26 C.F.R. §1.411(a)-4(a) (1979). We also conclude that the New Jersey statute that prohibits these offsets, N.J. Stat. Ann. §34:15-29 (Supp. 1979), is preempted by ERISA, 29 U.S.C. §1144(a) (1976).

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17. Raybestos, in the district court in Alessi, contended that the New Jersey statute should be struck down on at least two other grounds. First, that the statute was preempted under the National Labor Relations Act, and, second, that it was an unconstitutional impairment of the obligation of contracts. The court rejected both of these attacks, slip op. at 8-9. In light of our conclusion that the statute is preempted by ERISA itself, we need not reach these issues.

In light of our conclusions, which are contrary to the conclusions reached by the district courts in both *Buczynski* and *Alessi*, we will vacate the respective orders dated April 3, 1979 (*Buczynski*) and March 1, 1979 (*Alessi*) which permanently enjoin the defendants from offsetting Workmen's Compensation benefits and which required that reimbursement be made for amounts offset in the past; we direct that the district courts enter judgment for the defendants. Each side shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment, dated February 15, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT AND T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC. AND RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 78-0434)

No. 79-1668

BUCZYNSKI, HENRY, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

Judgment, dated February 15, 1980

THE GENERAL MOTORS CORPORATION,

Appellant,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSEN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

Certified Judgment in Lieu of Mandate dated March 27, 1980

Attest:

THOMAS F. QUINN
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

February 15, 1980

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Order Granting Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. 80-193

HENRY BUCZYNSKI, et al.,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION, et al.

ORDER ALLOWING CERTIORARI. Filed November 3, 1980.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

The case is consolidated with No. 79-1943 and a total of one hour is allotted for oral argument.